ASM Development (KL) Sdn Bhd v Econpile (M) Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24NCC-363–07 OF 2019
DARRYL GOON J
12 FEBRUARY 2020

Construction Law — Construction contracts — Adjudication of payment disputes — Construction Industry Payment and Adjudication Act 2012 ('the CIPAA') — Claim for payment of unpaid progress for work done — Whether enforcement of adjudication decision was valid — Whether the debt disputed was substantial ground — Whether an adjudication decision was disputable — Whether enforcement of adjudication decision in s 28 of the CIPAA restrained the presentation of winding up petition — Whether an injunction could be issued against presentation of a winding up petition even if there was a bona fide dispute on substantial grounds — Whether there was genuine dispute and counterclaims and/or set offs upon substantial grounds — Whether different amounts stated in defendant's statutory demand and amount that was subject matter of origination summons was fatal — Construction Industry Payment and Adjudication Act 2012 s 28

This was an application by the plaintiff for an injunction to restrain the defendant from presenting a winding up petition against it based on an adjudication decision. The plaintiff was a building contractor. By a letter of award dated 26 September 2016, but signed on 4 October 2016, the defendant was appointed by the plaintiff as the main contractor for a construction project ('the project'). Based on the letter of award, the contract between the parties would consist of several documents including the agreement and conditions of PAM Contract 2016 ('the construction contract'). Disputes arose between the parties and a payment claim dated 15 January 2019 was made by the defendant on the plaintiff under the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA'). In reply thereto, the plaintiff issued its payment response on 30 January 2019. The defendant's payment claim was for a total sum of RM74,887,164.34 allegedly due from the plaintiff in respect of the project. The sum claimed was made up of unpaid progress claims, some of which were uncertified by the plaintiff and the undervaluation of works done in respect of a certificate of payment no 15. The plaintiff denied that there was any undervaluation as alleged. It also contended that it had counterclaims and set offs against the defendant in excess of the amounts claimed by the defendant. On 18 March 2019, in parallel with the adjudication claim that was made and afoot, the defendant issued a notice of arbitration on the plaintiff to refer disputes and/or differences that were said to have arisen between the parties. On 17 May 2019, another notice of arbitration was issued by the

plaintiff on the defendant. The notice of arbitration was also premised upon disputes in respect of the construction contract and included a declaration of its wrongful termination and claims for loss and damage incurred. The learned adjudicator gave his decision in favour of the defendant. It was decided that the plaintiff was to pay the defendant: (a) RM67,767,269.32 being the adjudicated sum; (b) RM150,000 being legal costs; and (c) RM203,924.40 being costs of the adjudication. If the plaintiff neglected, failed and/or refused to pay the sum demanded within twenty one days or to secure or compound for it to the reasonable satisfaction of the defendant, winding up proceedings would be instituted against the plaintiff. The plaintiff issued the originating summons for an injunction to restrain the defendant from presenting or filing the winding up proceedings threatened. On 13 September 2019, the plaintiff took out Originating Summons WA-24C-173–09 of 2019 in the High Court in Kuala Lumpur, to set aside the adjudication decision. The plaintiff 's application was dismissed. The defendant obtained an order from the High Court in Kuala Lumpur in Originating Summons No WA-24C-113–07 of 2019 to enforce the adjudication decision as a judgment of the High Court. In granting the order, it was further ordered that the plaintiff paid the defendant the total sum adjudicated of RM59,767,269.32 together with the defendant's legal costs and the costs of the adjudication. The statutory demand was issued by the defendant before the order of the High Court of 29 November 2019 in Originating Summons No WA-24C-113–07 of 2019 was obtained. Up to the time of hearing of the current amended originating summons, no execution proceedings had been taken by the defendant to enforce the adjudication decision and no payment was made by the plaintiff pursuant to the adjudication decision. The issues were on: (a) the enforcement of adjudication decision; (b) whether the debt disputed was substantial ground; (c) whether an adjudication decision was disputable; (d) whether enforcement of adjudication decision in s 28 of the CIPAA restrained the presentation of winding up petition; (e) whether an injunction could be issued against the presentation of a winding up petition even if there was a bona fide dispute on substantial grounds; (f) whether there was a genuine dispute and counterclaims and/or set offs upon substantial grounds; and (g) the issue of different amounts stated in the defendant's statutory demand and the amount that was the subject matter of the origination summons.

Held, allowing plaintiff's application:

(1) The plaintiff's application to set aside or stay the execution of the adjudication decision had been dismissed by the High Court. The final decision on the dispute between the parties, including the subject matter of the adjudication decision and the plaintiff's counterclaim and set off, were still in the process of a pending arbitration. In regard to the enforcement of an adjudication decision, s 28(1) conferred the right to apply to the High Court for an order to enforce an adjudication decision

as if it was a judgment or order of the High Court. The adjudication decision was enforceable in accordance with the rules on execution of an order or judgment of the High Court (see paras 21–22 & 25–26).

(2) In the case where the debt was genuinely disputed on substantial grounds, the basis was said to be that it was a pre-requisite of the legislation, in the present case ss 465(1)(e) and 466(1)(a) of the Companies Act 2016, that there was an existence of a debt before a court might order the winding up of a company. A debt that was genuinely disputed on substantial grounds was not established as a debt. Winding up petitions had never been regarded as a suitable means to decide the validity or otherwise of disputed debts. Clearly, in respect of disputed debts, there might be substantial dispute of material facts requiring the attendance of witnesses. In such circumstances, the dispute would be more appropriately tried by way of a writ action rather than a petition. Till today, the procedure for winding up a company was still by way of a petition. It was settled that if the debt upon which the winding up petition was to be based was genuinely disputed on substantial grounds, whether the company was insolvent or not, was of no moment (see paras 36–38).

(3) Having regard to the provisions of the CIPAA and the rationale for this statutory adjudication mechanism, the very nature of an adjudication decision was such that it was not final in a sense equal to the finality of a judgment of a court. By virtue of s 13 of the CIPAA, an adjudication decision was only provisionally binding if there were concurrent arbitration or court proceedings, or conditionally binding if there were none but there might be such proceedings to have the dispute finally determined. The very nature of an adjudication decision was such that while it might be enforceable as if it were a judgment debt when ordered to be so, it was nevertheless disputable. It was still open to a party against whom the adjudication decision was given, to legally dispute the decision by way of arbitration or in court. A party against whom an adjudication decision was made might still dispute the decision, but until decided otherwise, the adjudication decision was to be honoured. If not honoured, and if so ordered by the court, the adjudication decision was enforceable as a judgment of the court, until and unless it was set aside or a final decision was arrived at to the contrary, in an arbitration or by a court of law (see paras 69–72).

(4) The enforcement under s 28 of the CIPAA did not specifically include the right to initiate winding up proceedings did not mean that it was bereft of any value. The various forms of execution or enforcement of judgments and orders of the court were available for the purposes of securing payment. It did not mean that winding up proceedings could not be commenced based on a debt that had arisen by virtue of an

adjudication decision — whether ordered to be enforced by the court or otherwise. All it means was that the presentation of a winding up petition based upon an adjudication decision was not a specific statutory right provided under the CIPAA and was subject to the general principles relating to abuse of the process of the court as referred to in Fortuna Holdings and the cases cited (see paras 81–83).

(5) Section 28 of the CIPAA merely afforded an order of the court to enforce the adjudication decision as if it was a judgment or order of the High Court. The authorities cited in respect of an adjudication decision upon which a statutory demand under s 466(1) of the Companies Act 2016 was based, did not decide that the debt created was not disputable even if ordered to be enforced as if it was a judgment or order of the High Court. Because an adjudication decision was not entered as a judgment or deemed equal to a judgment of the High Court, it was not indisputable like a judgment of the court. Nothing in the CIPAA displaced the principles enunciated in *Fortuna Holdings* which was accepted by the courts (see paras 118 & 122–123).

(6) It was clear that there were disputes and arguments against each party's claims. It was of the view that the plaintiff's disputes of the defendant's claims allowed by the adjudication decision and its counterclaims and/or set offs, save for its claim of RM1,524,735.62 allegedly based on the block purchase agreement, were bona fide and upon substantial grounds. Whether the plaintiff would finally be successful was a matter for the arbitrator and the court was not required express views on it (see para 144).

(7) The amount demanded in the defendant's statutory demand, while stipulated, was more than, and thus differed from, the amount that was the subject matter of the order in OS 113, that might not in itself be fatal. It was not merely in exactitude in the sum demanded in the defendant's statutory demand but the basis upon which the defendant's statutory demand was made. The defendant's statutory demand was predicated on the adjudication decision, before it was amended, and which decision was obviously disputed by the plaintiff coupled with crossclaims which exceeded the amount decided in the defendant's favour. It was not a statutory demand based on the order made in OS 113. The distinction drawn was no mere pedantry or form, but one of substance. Once a judgment or order was entered, and based on existing authorities, it was clear that a judgment creditor might issue a statutory demand under s 466(1)(a) of the Companies Act 2016 based on the judgment debt in respect of which no dispute to the debt might be countenanced (see paras 156–158).

[Bahasa Malaysia summary

Ini adalah permohonan oleh plaintif untuk satu injunksi bagi menghalang defendan dari mengemukakan petisyen penggulungan terhadapnya berdasarkan keputusan adjudikasi. Plaintif adalah kontraktor bangunan. Berdasarkan surat award bertarikh 26 September 2016, tetapi ditandatangani pada 4 Oktober 2016, defendan telah dilantik oleh plaintif sebagai kontraktor utama untuk projek pembinaan ('projek tersebut'). Berdasarkan surat award, kontrak antara kedua-dua pihak terdiri daripada beberapa dokumen termasuk perjanjian dan syarat Kontrak PAM 2016 ('kontrak pembinaan tersebut'). Pertikaian timbul antara pihak-pihak dan tuntutan pembayaran bertarikh 15 Januari 2019 dibuat oleh defendan ke atas pihak plaintif di bawah Akta Pembayaran dan Adjudikasi Industri Pembinaan 2012 ('APAIP'). Sebagai balasan kepadanya, plaintif mengeluarkan respons pembayaran pada 30 Januari 2019. Tuntutan pembayaran defendan adalah berjumlah RM74,887,164.34 yang didakwa perlu dibayar oleh plaintif berhubung dengan projek tersebut. Jumlah yang dituntut terdiri dari tuntutan kemajuan yang belum dibayar, yang mana antaranya tidak diperakui sah oleh plaintif dan kerja siap yang dinilai rendah berkenaan dengan perakuan pembayaran no 15. Plaintif menafikan bahawa terdapat sebarang penilaian rendah seperti yang didakwa. Ia juga berpendapat bahwa pihaknya telah membuat tuntutan balas dan penolakan terhadap defendan melebihi jumlah yang dituntut oleh defendan. Pada 18 Mac 2019, selaras dengan tuntutan adjudikasi yang dibuat dan dikemukakan, defendan mengeluarkan notis timbang tara ke atas plaintif untuk merujuk pertikaian dan/atau perselisihan yang dikatakan timbul antara kedua-dua pihak. Pada 17 Mei 2019, satu lagi notis timbang tara dikeluarkan oleh plaintif ke atas defendan. Notis timbang tara tersebut juga dibuat berdasarkan pertikaian berkaitan dengan kontrak pembinaan dan termasuklah deklarasi penamatan secara salah dan tuntutan kehilangan dan kerugian yang terakru. Adjudikator yang bijaksana memberikan keputusannya yang memihak kepada defendan. Ia telah diputuskan bahawa plaintif harus membayar defendan: (a) RM67,767,269.32 sebagai jumlah yang diadjukasi; (b) RM150,000 adalah kos guaman; dan (c) RM203,924.40 sebagai kos adjudikasi. Sekiranya plaintif mengabaikan, gagal dan/atau enggan membayar jumlah yang dituntut dalam masa dua puluh satu hari atau untuk mendapatkan atau mengkompaun jumlah tersebut untuk kepuasan munasabah defendan, prosiding penggulungan akan dimulakan terhadap plaintif. Plaintif mengemukakan saman pemula untuk satu injunksi bagi menghalang defendan dari mengemukakan atau memfailkan prosiding penggulungan. Pada 13 September 2019, plaintif mengemukakan Saman Pemula WA-24C-173–09 Tahun 2019 di Mahkamah Tinggi di Kuala Lumpur, untuk mengetepikan keputusan adjudikasi. Permohonan plaintif ditolak. Defendan mendapat perintah dari Mahkamah Tinggi di Kuala Lumpur melalui Saman Pemula No WA-24C-113–07 Tahun 2019 untuk menguatkuasakan keputusan adjudikasi sepertimana keputusan Mahkamah

Tinggi. Dalam memberikan perintah tersebut, ia selanjutnya diperintahkan agar plaintif membayar kepada defendan jumlah keseluruhan yang diadjudikasikan sebanyak RM59,767,269,32 bersama dengan kos guaman dan kos adjudikasi defendan. Tuntutan statutori dikeluarkan oleh defendan sebelum perintah Mahkamah Tinggi pada 29 November 2019 dalam Saman Pemula No WA-24C-113–07 Tahun 2019 diperoleh. Sehingga saat pendengaran saman pemula terpinda ini, tidak ada sebarang prosiding pelaksanaan yang dibuat oleh defendan bagi menguatkuasakan keputusan adjudikasi dan tidak ada sebarang pembayaran yang dibuat oleh plaintif berdasarkan keputusan adjudikasi. Isu-isu adalah: (a) penguatkuasaan keputusan adjudikasi; (b) sama ada hutang yang dipertikaikan tersebut adalah alasan yang munasabah; (c) sama ada keputusan adjudikasi boleh dipertikaikan; (d) sama ada penguatkuasaan keputusan adjudikasi dalam s 28 APAIP menghalang pengemukaan petisyen penggulungan; (e) sama ada injunksi dapat dikeluarkan terhadap pengemukaan petisyen penggulungan walaupun terdapat pertikaian yang suci hati atas alasan yang munasabah; (f) sama ada terdapat perselisihan dan tuntutan balas yang nyata dan/atau penolakan pada alasan yang munasabah; dan (g) pengeluaran jumlah berbeza seperti yang dinyatakan dalam tuntutan statutori defendan dan jumlah yang menjadi perkara utama saman pemula.

Diputuskan, membenarkan permohonan plaintif:

(1) Permohonan plaintif untuk mengetepikan atau menggantung pelaksanaan keputusan adjudikasi telah ditolak oleh Mahkamah Tinggi. Keputusan akhir mengenai pertikaian antara pihak-pihak, termasuk perkara utama keputusan adjudikasi dan tuntutan balas dan penolakan plaintif, masih dalam proses timbang tara yang akan berjalan. Berkenaan dengan penguatkuasaan keputusan adjudikasi, s 28(1) memberikan hak untuk membuat permohonan ke Mahkamah Tinggi untuk satu perintah bagi menguatkuasakan keputusan adjudikasi seolah-olah ianya adalah keputusan atau perintah oleh Mahkamah Tinggi. Keputusan adjudikasi dapat dikuatkuasakan berdasarkan dengan peraturan pelaksanaan perintah atau penghakiman oleh Mahkamah Tinggi (lihat perenggan 21–22 & 25–26).

(2) Dalam hal di mana hutang tersebut benar-benar dipertikaikan dengan alasan yang munasabah, asas tersebut dikatakan bahawa ianya adalah prasyarat perundangan, dalam kes semasa ss 465(1)(e) dan 466(1)(a) Akta Syarikat 2016, bahawa terdapat kewujudan hutang di hadapan mahkamah boleh memberikan perintah penggulungan syarikat. Hutang yang benar-benar dipertikaikan dengan alasan yang munasabah tidak dibuktikan sebagai hutang. Petisyen penggulungan tidak pernah dianggap sebagai kaedah yang sesuai untuk menentukan kesahihan atau sebaliknya hutang yang dipertikaikan. Jelas, berkenaan dengan hutang yang dipertikaikan, mungkin terdapat pertikaian yang munasabah

mengenai fakta material yang memerlukan kehadiran saksi. Dalam keadaan seperti itu, pertikaian tersebut sesuai dibicarakan melalui tindakan writ dan bukannya petisyen. Sehingga ke hari ini, prosedur penggulungan syarikat masih lagi melalui petisyen. Ianya telah diputuskan bahawa sekiranya hutang yang menjadi asas kepada petisyen penggulungan tersebut dipertikaikan dengan alasan yang munasabah, sama ada syarikat tersebut solven atau tidak, tidak ada kewajaran (lihat perenggan 36–38).

(3) Berkaitan dengan peruntukan APAIP dan rasional disebalik mekanisme adjudikasi statutori ini, sifat nyata keputusan adjudikasi adalah ianya tidak muktamad dalam erti yang sama dengan penghakiman akhir mahkamah. Berdasarkan s 13 APAIP, keputusan adjudikasi hanya mengikat sementara sekiranya terdapat prosiding timbang tara atau mahkamah secara serentak, atau mengikat secara bersyarat sekiranya tiada tetapi mungkin terdapat prosiding lain yang dipertikaikan akhirnya diputuskan. Sifat nyata keputusan adjudikasi adalah sementara ianya mungkin dapat dikuatkuasakan seolah-olah ianya adalah hutang penghakiman semasa diperintahkan sedemikian, namun ianya masih dapat dipertikaikan. Ianya masih lagi terbuka bagi pihak terhadap keputusan adjudiskasi tersebut diberikan, untuk secara sah mempertikaikan keputusan tersebut dengan cara timbang tara atau melalui mahkamah. Pihak yang mana keputusan adjudikasi diberikan terhadapnya masih boleh mempertikaikan keputusan tersebut, tetapi sehingga ia diputuskan sebaliknya, keputusan adjudikasi harus dilaksanakan. Sekiranya tidak dilaksanakan, dan jika diperintahkan oleh mahkamah, keputusan adjudikasi dapat dikuatkuasakan sebagai keputusan mahkamah, sehingga dan kecuali sekiranya keputusan tersebut diketepikan atau keputusan akhir diputuskan sebaliknya, dalam timbang tara atau oleh mahkamah perundangan (lihat perenggan 69–72).

(4) Pelaksanaan di bawah s 28 APAIP tidak secara khusus termasuk hak untuk memulakan prosiding penggulungan tidak bererti bahawa ia tiada sebarang nilai. Pelbagai bentuk pelaksanaan atau penguatkuasaan penghakiman dan perintah mahkamah tersedia untuk tujuan mendapatkan pembayaran. Ini tidak bermaksud bahawa prosiding penggulungan tidak dapat dimulakan berdasarkan hutang yang timbul berdasarkan keputusan adjudikasi — sama ada diperintahkan untuk dikuatkuasa oleh mahkamah atau sebaliknya. Apa yang dimaksudkan adalah bahawa pengemukaan petisyen penggulungan berdasarkan keputusan adjudikasi bukan merupakan hak undang-undang khusus yang diperuntukkan di bawah APAIP dan tertakluk kepada prinsip-prinsip umum yang berkaitan dengan penyalahgunaan proses mahkamah sebagaimana dirujuk dalam Fortuna Holdings dan kes yang dirujuk (lihat perenggan 81–83).

(5) Seksyen 28 APAIP hanya memberikan perintah mahkamah dalam menguatkuasakan keputusan adjudikasi seolah-olah ia adalah penghakiman atau perintah Mahkamah Tinggi. Otoriti yang dirujuk berkenaan keputusan adjudikasi yang mana tuntutan statutori berdasarkan s 466(1) Akta Syarikat 2016 diguna pakai, tidak diputuskan bahawa hutang yang dibuat tidak dipertikaikan walaupun jika diperintahkan untuk dilaksanakan seolah-olah ia adalah penghakiman atau perintah Mahkamah Tinggi. Oleh kerana keputusan adjudikasi tidak dimasukkan sebagai penghakiman atau dianggap sama dengan penghakiman Mahkamah Tinggi, ianya tidak dipertikaikan sepertimana keputusan mahkamah. Tidak ada dalam APAIP yang menggantikan prinsip-prinsip yang dinyatakan dalam *Fortuna Holdings* yang diterima oleh mahkamah (lihat perenggan 118 & 122–123).

(6) Ianya adalah jelas bahawa terdapat pertikaian dan pendapat terhadap tuntutan pihak-pihak. Ia diputuskan bahawa pertikaian plaintif mengenai tuntutan defendan yang dibenarkan melalui keputusan adjudikasi dan tuntutan balas dan/atau penolakan, kecuali tuntutannya sebanyak RM1,524,735.62 yang didakwa berdasarkan perjanjian pembelian blok, adalah suci hati dan berdasarkan alasan yang munasabah. Sama ada plaintif akhirnya akan berjaya adalah perkara yang tidak memerlukan pandangan yang jelas dari penimbang tara dan mahkamah mengenai hal tersebut (lihat perenggan 144).

(7) Jumlah yang dituntut dalam tuntutan statutori defendan, walaupun telah ditetapkan, lebih dari, dan dengan demikian berbeza dengan, jumlah yang menjadi perkara utama dalam perintah OS 113, yang mungkin tidak fatal. Ianya bukan hanya pada ketepatan jumlah yang dituntut dalam tuntutan statutori defendan tetapi asas di mana tuntutan statutori defendan dibuat. Tuntutan statutori defendan adalah berdasarkan kepada keputusan adjudikasi, sebelum ia dipinda, dan keputusan yang mana jelas dipertikaikan oleh plaintif ditambah dengan tuntutan silang yang melebihi jumlah yang diputuskan memihak kepada pihak defendan. Ianya bukan tuntutan statutori berdasarkan perintah yang dibuat dalam OS 113. Perbezaan yang dibuat bukan sekadar butiran atau bentuk, tetapi lebih kepada kandungan. Setelah penghakiman atau perintah dimasukkan, dan berdasarkan otoriti yang sedia ada, jelas bahawa pemiutang penghakiman boleh mengeluarkan tuntutan statutori di bawah s 466(1)(a) Akta Syarikat 2016 berdasarkan hutang penghakiman yang tidak ada pertikaian hutang mungkin dapat diatasi (lihat perenggan 156–158).]

Cases referred to

Barisan Performa Sdn Bhd v Hype Park City Sdn Bhd [2018] MLJU 10, HC (refd)

Bayoil SA; Seawind Tankers Corp v Bayoil SA, Re [1999] 1 All ER 374; [1999] 1 WLR 147, CA (refd)
Bertam Development Sdn Bhd v R & C Cergas Teguh Sdn Bhd [2017] MLJU 2276, HC (refd)
Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd [2001] 1 All ER (Comm) 1041; [2000] EWCA Civ 507, CA (refd)
Bumimetro Construction Sdn Bhd v Mayland Universal Sdn Bhd and another appeal [2017] MLJU 2245, HC (folld)
Douglas Aerospace Ltd, Re [2015] NSWSC 167, SC (refd)
Fortuna Holdings Pty Ltd v The Deputy Commissioner of Taxation of the Commonwealth of Australia [1978] VR 83, SC (refd)
Foster Wheeler E & C (Malaysia) Sdn Bhd v Arkema Thiochemicals Sdn Bhd and another case [2015] MLJU 1952; [2015] 1 LNS 632, HC (refd)
Gill Construction Co Ltd v Butler [2010] 2 NZLR 229, HC (refd)
Gold Hill Mines, Re (1883) 23 Ch D 210 (refd)
HF Wools Ltd, Re [1970] 1 Ch 27 (refd)
Jamil Mohammed v Dr Michael Bowles [2002] 394 SD 2002 (refd)
Josu Engineering Construction Sdn Bhd v TSR Bina Sdn Bhd [2014] 11 MLJ 916; [2013] 9 CLJ 650, HC (refd)
Karisma Synergy Sdn Bhd v Gates PCM Construction (M) Sdn Bhd [2019] 1 CLJ 122, HC (refd)
Lafarge Concrete (M) Sdn Bhd v Gold Trend Builders Sdn Bhd [2012] 6 MLJ 817, CA (refd)
Laywood v Holmes Construction Wellington Ltd [2009] NZCA 35, CA (refd)
Likas Bay Precinct Sdn Bhd v Bina Puri Sdn Bhd [2019] 3 MLJ 244, CA (refd)
Lim Poh Yeoh (Alias Lim Aster) v Ts Ong Construction Pte Ltd [2016] SGHC 179; [2016] 5 SLR 226, HC (refd)
MRCB Builders Sdn Bhd v Southern Builders (J) Sdn Bhd [2019] MLJU 224 (refd)
Macob Civil Engineering Ltd v Morrison Construction Ltd [1999] BLR 93 (refd)
Malaysia Air Charter Co Sdn Bhd v Petronas Dagangan Sdn Bhd [2000] 4 MLJ 657, FC (folld)
Mann and Another v Goldstein and Anor [1968] 2 All ER 769, ChD (refd)
Maril-Rionebel (M) Sdn Bhd & Anor v Perdana Merchant Bankers Bhd and Other Appeals [2001] 4 MLJ 187, CA
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Milsonland Development Sdn Bhd v Macro Resources Sdn Bhd [2018] 1 LNS 2078, CA (refd)
Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd [2007] 3 MLJ 316, CA (refd)
NFC Labuan Shipleasing I Ltd v Semua Chemical Shipping Sdn Bhd [2017] MLJU 900; [2017] 1 LNS 943, HC (refd)
New Travellers' Chambers, Ltd v Cheese and Green (1894) 70 LT 271 (refd)

Niger Merchants Co v Capper (1877) 18 ChD 557, ChD (refd)
Pacific & Orient Insurance Co Bhd v Muniammah Muniandy [2010] MLJU 2217; [2011] 1 CLJ 947, CA (refd)
People Realty Sdn Bhd v Red Rock Construction Sdn Bhd [2008] 1 MLJ 453; [2008] 1 CLJ 632, CA (refd)
Pontian United Theatre Sdn Bhd v Southern Finance Bhd (formerly known as United Merchant Finance Bhd) [2006] 2 MLJ 602; [2006] 1 CLJ 1067, CA (refd)
Ridgeway Motors (Isleworth) Ltd v ALTS Ltd [2005] 2 All ER 304, CA (refd)
Stiell Ltd v Riema Control Systems Ltd [2000] Scot CS 174 (refd)
United Malayan Banking Corp Bhd v Richland Trade & Development Sdn Bhd [2000] 1 MLJ 385, FC (refd)
Victory House General Partner Ltd, Re [2019] Ch 1 (refd)
View Esteem Sdn Bhd v Bina Puri Holdings Bhd [2018] 2 MLJ 22, FC (refd)
Volcanic Investments Ltd v Dempsey & Wood Civil Contractors Ltd (2005) 2 NZCCLR 370, HC (refd)
Walker Construction (UK) Ltd v Quaside Homes Ltd and Another [2014] EWCA Civ 93, CA (refd)
Zalam Corp Sdn Bhd lwn Dolomite Readymixed Concrete Sdn Bhd [2011] MLJU 1552; [2011] 9 CLJ 705, CA (refd)

Legislation referred to

Arbitration Act 1952 (repealed by Arbitration Act 2005) s 27
Arbitration Act 2005 s 38, 38(1)
Building and Construction Industry Security of Payment Act [SG]
Building and Construction Industry Security of Payment Act 1999 [AU] s 25
Companies Act 1965 (repealed by Companies Act 2016) s 218, 218(2)(a)
Companies Act 1993 [NZ]
Companies Act 2016 ss 465, 465(1)(e), 466, 466(1), (1)(a)
Construction Contracts Act 2002 [NZ] ss 59, 79
Construction Industry Payment and Adjudication Act 2012 ss 4, 12(2), 13, 16, 19(1)(d), 25(1), 27, 27(1), (2), 28, 28(1), (2), (3), 37, 79
Corporations Act 2001 [AU]
Insolvency Rules 1986 [UK] r 6.5(4)
Insolvency Act 1967 [NZ]
Rules of Court 2012 O 15, O 45

Edwin Lim (Ng Sim Hong with him) (Edwin Lim & Suren) for the plaintiff.
Lam Wai Loon (Pan Yan Teng and Amy Hiew with him) (Harold & Lam Partnership) for the defendant.

Darryl Goon J:

[1] This was an application by the plaintiff for an injunction to restrain the defendant from presenting a winding up petition against it based on an adjudication decision.

BACKGROUND

[2] The plaintiff is a building contractor. By a letter of award dated 26 September 2016, but signed on 4 October 2016, the defendant was appointed by the plaintiff as the main contractor for a construction project described as:

> Cadangan Pembangunan Bercampur 69 Tingkat Yang Mengandungi 7 Blok Pangsapuri Servis (4214 Unit), iaitu Blok A-58 Tingkat (678 Unit), Blok B-58 Tingkat (618 Unit), Blok C-58 Tingkat (560 Unit), Blok D-58 Tingkat (678 Unit), Blok E-58 Tingkat (618 Unit), Blok G-58 Tingkat (502 Unit). 8 Tingkat Podium Tempat Letak Kereta, 7 Tingkat Ruang Perniagaan (Aras 1-7), 1 Tingkat Aras Kemudahan (Aras 9), 4 Tingkat Tempat Letak Kereta (Aras Kemudahan (Aras 9), 4 Tingkat Tempat Letak Kereta (Aras LG1, Basement 2 & Basement 1) di atas Lot 36190, Mukim Petaling Kuala Lumpur

hereinafter referred to as the 'project'.

[3] Based on the letter of award, the contract between the parties would consist of several documents including the agreement and conditions of PAM Contract 2016, all of which shall collectively be referred to as the 'Construction Contract' for ease of reference.

[4] Disputes arose between the parties and a payment claim dated 15 January 2019 was made by the defendant on the plaintiff under the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA'). In reply thereto, the plaintiff issued its payment response on 30 January 2019.

[5] The defendant's payment claim was for a total sum of RM74,887,164.34 allegedly due from the plaintiff in respect of the project. This sum claimed was made up of unpaid progress claims, some of which were uncertified by the plaintiff, and the undervaluation of works done in respect of a Certificate of Payment No 15.

[6] The plaintiff, in response, denied that there was any undervaluation as alleged. It also contended that it had counterclaims and set offs against the defendant in excess of the amounts claimed by the defendant.

[7] On 18 March 2019, in parallel with the adjudication claim that was made and afoot, the defendant issued a notice of arbitration on the plaintiff to

refer 'disputes and/or differences' that were said to have arisen between the parties. Arbitration was the form of dispute resolution agreed to between the parties under the construction contract. This notice of arbitration issued by the defendant was in respect of its claims and damages based on alleged breaches of the construction contract by the plaintiff. Significantly, these claims encompassed the payment claims the defendant had earlier made under the CIPAA.

[8] On 17 May 2019, another notice of arbitration was issued, this time by the plaintiff on the defendant. This notice of arbitration was also premised upon disputes in respect of the construction contract and included a declaration of its wrongful termination and claims for loss and damage incurred. As there were now two separate arbitrations initiated by the parties, a proposal that both the disputes be consolidated and heard before a single arbitrator was included in the notice of arbitration.

[9] On 21 June 2019, in the adjudication proceedings, the learned adjudicator gave his decision in favour of the defendant. It was decided that the plaintiff was to pay the defendant: (a) RM67,767,269.32 being the adjudicated sum; (b) RM150,000 being legal costs; and (c) RM203,924.40 being costs of the adjudication.

[10] On 25 June 2019, just four days later, the defendant's solicitors served on the plaintiff a statutory demand for payment of the sums owed to the defendant totalling RM67,985,244.12, under s 466(1)(a) of the Companies Act 2016.

[11] By this statutory demand the plaintiff was also informed that if it neglected, failed and/or refused to pay the sum demanded within twenty one days or to secure or compound for it to the reasonable satisfaction of the defendant, the plaintiff would be deemed unable to pay its debts within the meaning of s 465(1)(e) of the Companies Act 2016 and winding up proceedings would be instituted against the plaintiff.

[12] On 9 July 2019, the plaintiff issued the originating summons herein for an injunction to restrain the defendant from presenting or filing the winding up proceedings threatened. Minor amendments to the dates in the originating summons filed were made.

[13] The injunction sought by the plaintiff is now commonly referred to as a 'Fortuna injunction' after the decision of McGarvie J, of the Supreme Court of Victoria, in Australia in the case of *Fortuna Holdings Pty Ltd v The Deputy Commissioner of Taxation of the Commonwealth of Australia* [1978] VR 83.

[14] On 7 August 2019, a supplementary adjudication decision was issued by the learned adjudicator which corrected the sum that the defendant was awarded under the adjudication decision of 21 June 2019 by reducing it from RM67,985,244.12 to RM59,767,269.32. For convenience, the adjudication decision of 21 June 2019, as corrected by the supplementary adjudication decision of 7 August 2019, shall hereinafter be referred to as the 'adjudication decision'.

[15] On 13 September 2019, the plaintiff took out Originating Summons WA-24C-173–09 of 2019 in the High Court in Kuala Lumpur, to set aside the adjudication decision.

[16] On 29 November 2019, the plaintiff's application to set aside the adjudication decision was dismissed.

[17] Also on 29 November 2019, the defendant obtained an order from the High Court in Kuala Lumpur in Originating Summons No WA-24C-113–07 of 2019 to enforce the adjudication decision as a judgment of the High Court. In granting this order, it was further ordered that the plaintiff pays the defendant the total sum adjudicated of RM59,767,269.32 together with the defendant's legal costs and the costs of the adjudication.

[18] The statutory demand was therefore issued by the defendant before the order of the High Court of 29 November 2019 in Originating Summons No WA-24C-113–07 of 2019 was obtained.

[19] Up to the time of hearing of the current amended originating summons, no execution proceedings had been taken by the defendant to enforce the adjudication decision and no payment was made by the plaintiff pursuant to the adjudication decision.

ENFORCEABILITY OF ADJUDICATION DECISIONS

[20] Firstly, it is stated quite clearly under s 13 of the CIPAA that an adjudication decision is binding unless:

(a) it is set aside by the High Court on any of the grounds referred to in section 15;

(b) the subject matter of the decision is settled by a written agreement between the parties; or

(c) the dispute is finally decided by arbitration or the court.

[21] In the current case, the plaintiff's application to set aside or stay the execution of the adjudication decision had been dismissed by the High Court.

[22] However, the final decision on the dispute between the parties, including the subject matter of the adjudication decision and the plaintiff's counterclaim and set off, are still in the process of a pending arbitration.

[23] Secondly, in regard to the enforcement of an adjudication decision, s 28 of the CIPAA states as follows:

> 28 Enforcement of adjudication decision as a judgment
>
> (1) A party may enforce an adjudication decision by applying to the High Court for an *order to enforce* the adjudication decision *as if it is a judgment or order of the High Court.*
>
> (2) The High Court may make an order in respect of the adjudication decision either wholly or partly and may make an order in respect of interest on the adjudicated amount payable.
>
> (3) The order made under subsection (2) may be *executed in accordance with the rules on execution of the orders or judgment* of the High Court. (Emphasis added.)

[24] In this regard, and as stated above, the defendant had, on 29 of November 2019, obtained an order from the High Court in Kuala Lumpur to enforce the adjudication decision as a judgment of the High Court.

[25] Section 28(1) confers the right to apply to the High Court for an order to enforce an adjudication decision as if it is a judgment or order of the High Court. Section 28(2) confers upon the High Court a discretion to make an order in respect of the adjudication decision. Section 28(3) provides that the order under s 28(2) may be *executed* in accordance with the rules on execution of an order or judgment of the High Court.

[26] Therefore, the adjudication decision was and is clearly enforceable and enforceable in accordance with the rules on execution of an order or judgment of the High Court.

WINDING UP PROCEEDINGS

[27] Section 465 of the Companies Act 2016 sets out the circumstances in which a company may be wound up by the court and it states as follows:

> 465 Circumstances in which company may be wound up by Court.
>
> (1) The Court may order the winding up if —
>
> (a) ...
>
> ...

(e) the company is unable to pay its debts;

[28] Section 466 of the Companies Act 2016 provides for when a company may be deemed 'unable to pay its debts'. Section 466 provides as follows:

466 Definition of 'inability to pay debts'

(1) A company shall be deemed to be unable to pay its debts if —

(a) the company is indebted in a sum exceeding the amount as may be prescribed by the Minister and a creditor by assignment or otherwise has *served a notice of demand*, by himself or his agent, *requiring the company to pay the sum due* by leaving the notice at the registered office of the company, *and the company has for twenty-one days after the service of the demand neglected to pay the sum* or to secure or compound for it to the satisfaction of the creditor;

(b) *execution* or other process issued *on a judgment, decree or order of any Court in favour of a creditor of the company is returned unsatisfied in whole or in part*, or

(c) it is proved to the satisfaction of the Court that the company is unable to pay its debts and in determining whether a company is unable to pay its debts the Court shall take into account the contingent and prospective liabilities of the company. (Emphasis added.)

[29] For the purposes of s 466(1)(a), it can be seen that there is no need to premise the statutory demand therein provided upon a judgment debt. A notice may be issued so long as there is a debt even if there is no judgment or pronouncement in respect of the debt (see *Lafarge Concrete (M) Sdn Bhd v Gold Trend Builders Sdn Bhd* [2012] 6 MLJ 817).

[30] In addition, there is also no requirement that an adjudication decision must first be ordered to be enforced as a judgment of the High Court before there can be said to be a debt based on the adjudication decision. These were made clear by the Court of Appeal in *Likas Bay Precinct Sdn Bhd v Bina Puri Sdn Bhd* [2019] 3 MLJ 244.

[16] Now, in our view, the language employed under s 28 of the CIPAA, does not convey such an interpretation, in the sense that the decision of the adjudicator must be registered with the High Court before a statutory notice under ss 465(1)(e) and (h) of the Companies Act 2016, could be issued. Rather, it was *our view that for the purpose of issuing a notice to wind-up a company pursuant to s 465(1)(e) and (h) of the Companies act 2016, it is not a mandatory requirement that there must be a judgment entered in favour of the respondent petitioner for the amount that was being claimed and pursued against the appellant debtor for payment of the same*. In the case of *NCK Wire Products Sdn Bhd v Konmark Corp Sdn Bhd* [2001] 6 MLJ 57 ('the *NCK Wire Products* case') the petition to wind up the respondent company was resisted, among

others, on the ground that the petitioner had failed to obtain judgment for the amount prior to bringing the winding up proceedings against the respondent. The debt was in relation to non-payment of bills for goods sold and delivered by the petitioner to the respondent company. This objection was dismissed by learned Justice T Selventhiranathan (as he then was) whereby he was of the view that the crux of the matter was whether the respondent was indebted for the amount claimed and that it was unable to pay its debt to the petitioner. On the facts of that case, since the petitioner had shown that the respondent could not pay the said debt, the two enclosures by the respondent, objecting to the winding up petition were dismissed with costs. (Emphasis added.)

[31] It is convenient to add at this juncture that in *Likas*, there was no dispute on substantial grounds raised against the amount in the adjudication decision (so too in the case of *MRCB Builders Sdn Bhd v Southern Builders (J) Sdn Bhd* [2019] MLJU 224). The closest to a dispute was the contention that the adjudication decision did not mention or state that the payments due were to be made to the respondent petitioner. That was more a technical objection rather than a dispute on the merits as to whether the debt was owed. The Court of Appeal agreed with the findings of the learned judicial commissioner, stating as follows:

[25] With respect, *we were in agreement with the finding of the JC when he ruled that for all intents and purposes, the payments due from the appellant referred to in the said order were for the benefit of the respondent petitioner. It was undisputed that the adjudication order was issued pursuant to an adjudication proceedings which had involved only the respondent petitioner and the appellant as litigating parties. The respondent petitioner was the party that had claimed from the appellant for work it had performed for the appellant under an agreement between them that was not in dispute*. In light of the appellant's clear passivity when the action was taken against it by the respondent petitioner, we were in agreement with the submission of learned counsel for the respondent petitioner that *the belated demur by the appellant was but an afterthought devoid of any merit, aimed at staving off the winding up notice*. As such, we found nothing to fault the learned JC for having arrived at such a decision, a decision which, in the circumstances of this case, is a reasonable one and which a reasonable tribunal similarly circumstanced would have found acceptable. (Emphasis added.)

[32] As indicated above, the statutory demand issued by the defendant was based on the adjudication decision as at 21 June 2019 as it stood, before the amount awarded was adjusted by the supplementary adjudication decision. However, the adjusted sum was still above the required statutory minimum and based on the decision of the Federal Court in *Malaysia Air Charter Co Sdn Bhd v Petronas Dagangan Sdn Bhd* [2000] 4 MLJ 657, the validity of the statutory demand is not affected. Although this decision of the Federal Court was based on s 218 of the former Companies Act 1965, I am of the view that the principles enunciated apply equally (see also *United Malayan Banking Corp Bhd v Richland Trade & Development Sdn Bhd* [2000] 1 MLJ 385). As was

stated by Mohd Nazlan Ghazali J in *Karisma Synergy Sdn Bhd v Gates PCM Construction (M) Sdn Bhd* [2019] 1 CLJ 122 at pp 135–136, a view which I respectfully agree with:

> [54] The Federal Court in the case of *Malaysia Air Charter Company Sdn Bhd v Petronas Dagangan Sdn Bhd* [2000] 4 CLJ 437 has ruled that a notice of demand under s 218(2)(a) of the Companies Act 1965 need not specify the exact sum due as at the date of the demand since for so long as the sum due exceeds RM500 (the statutory threshold then) and remains unpaid, after a demand has been made, without a reasonable explanation to the satisfaction of the court, there is 'neglect' to pay such sum within the meaning of the said section. The Federal Court was of the view that commercial reality demanded that preference be accorded to an interpretation that will remove from unmeritorious respondents the temptation to undertake an investigation into the exactness of the debt claimed to be owing on the relevant date.
>
> [55] This follows the English case of *Re Tweeds Garages Ltd* [1962] 1 All ER 121 which held that where there was no doubt that petitioners were creditors for a sum which would otherwise entitle them to a winding-up order, a dispute as to the precise amount owed was not a sufficient answer to the petitioner such that a winding-up order would be granted.
>
> [56] There is no reason not to apply the above-said ruling to the corresponding provisions in the Companies Act 2016, specifically s 466(1) which is substantially similar to the former s 218(2)(a) of the Companies Act 1965. Thus in the instant case, taking into account the 'disputed' portion, the remainder sum making up the debt in the statutory demand issued by the petitioner is still comfortably above the minimum threshold under the law, beyond which a winding up may be pursued.

[33] However, the courts have long recognised that it would intervene to restrain the presentation of a winding up petition or if presented, to restrain the advertisement of the petition presented, if there is an abuse of the process of the court (see *Mann and Another v Goldstein and Anor* [1968] 2 All ER 769).

[34] In the case of *Fortuna Holdings,* McGarvie J recognised that an abuse of the process of the court may arise to warrant the issue of an injunction to restrain the presentation of a winding up petition in two situations. The first is where the intended petition has no chance of success. The second, which is more complex, involves a claimant who proposes to assert a disputed claim by a procedure, such as the presentation of a winding up petition, that would cause irreparable damage to a company, rather than by a suitable alternative procedure (see *Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd* [2007] 3 MLJ 316 at pp 321–322, in which the two situations, or 'branches of the principle', set out in the judgment of McGarvie J were reproduced *in extenso* by the Court of Appeal; see also *Pacific & Orient Insurance Co Bhd v Muniammah Muniandy* [2010] MLJU 2217; [2011] 1 CLJ 947).

[35] Within the 'second branch of the principle', McGarvie J identified two possible situations when an injunction might issue to restrain the presentation of a winding up petition. The first is where the petition is to be based on a debt that is genuinely disputed on substantial grounds (see also for example *Mann and Another v Goldstein and Anor* [1968] 2 All ER 769). The second is where the existence of the creditor's debt may not be disputed, but the company 'genuinely claims on substantial grounds to have a crossclaim equal to or exceeding the petitioner's debt'.

[36] In the case where the debt is genuinely disputed on substantial grounds, the basis is said to be that that it is a pre-requisite of the legislation, in the present case ss 465(1)(e) and 466(1)(a) of the Companies Act 2016, that there exists a *debt* before a court may order the winding up of a company (see *Mann and Another v Goldstein and Anor* [1968] 2 All ER 769 at p 775). A debt that is genuinely disputed on substantial grounds is not established as a debt. In addition, winding up petitions have never been regarded as a suitable means to decide the validity or otherwise of disputed debts. As Kekewich J observed in *New Travellers' Chambers, Ltd v Cheese and Green* (1894) 70 LT 271 at p 272:

> Of course the question whether this is a debt or not may possibly be tried by a winding-up petition; but *it has been said over and over again, that the presentation of a winding-up petition is not a convenient, and often not a proper method of trying a disputed debt*. If there is any reasonable ground for disputing the existence of the debt — *if the question is not a mere question of quantum, but whether there is in fact a debt or not — a petition ought not to be presented, and therefore the court ought to restrain the presentation of the petition*. (Emphasis added.)

See also the observations of Sir James Bacon VC in *Re Gold Hill Mines* (1883) 23 Ch D 210 at pp 211–212 and that of Sir George Jessel MR in *Niger Merchants Co v Capper* (1877) 18 Ch D 557 at p 559 cited in *Fortuna Holdings* by McGarvie J.

[37] Clearly, in respect of disputed debts, there may be substantial dispute of material facts requiring the attendance of witnesses. In such circumstances, the dispute would be more appropriately tried by way of a writ action rather than a petition. Till today, the procedure for winding up a company is still by way of a petition.

[38] In the instant case, learned counsel for the defendant contended that there is evidence that the plaintiff is insolvent. However, it is also settled that if the debt upon which the winding up petition is to be based is genuinely disputed on substantial grounds, whether the company is insolvent or not, is of no moment. As Gopal Sri Ram JCA stated in *Mobikom Sdn Bhd* at p 321 of the report:

> Once the debt on which the proposed petition is based is bona fide disputed it

matters not that the debtor company is in fact insolvent. See, *Mann v Goldstein* [1968] 2 All ER 769.

IS AN ADJUDICATION DECISION DISPUTABLE?

[39] In *Pacific & Orient Insurance Co Bhd v Muniammah Muniandy* [2010] MLJU 2217; [2011] 1 CLJ 947, Ramly JCA (as His Lordship then was) made it quite clear that insofar as a judgment debt of a court of law is concerned, it cannot be regarded as a disputed debt.

> [28] The second principle established in the *Fortuna* case is that an injunction of that nature may be granted in cases where a petitioner proposing to present a petition has chosen to assert a disputed claim, by a procedure which might produce irreparable damage to the company, rather than by a suitable alternative procedure.
>
> [29] *This principle applies only to disputed debt. It does not apply to cases where the debt in question is undisputed. As long as the debt cannot be disputed, it is no consequence whether or not it will cause irreparable damage to the company, if presented. A valid and enforceable judgment of court as in the present case, (unless set aside or stayed) cannot be considered a disputed debt. The law is settled on this point*. Therefore, an order for injunction as prayed for by the appellant in the present case, also cannot be granted under this principle. (Emphasis added.)

[40] In *People Realty Sdn Bhd v Red Rock Construction Sdn Bhd* [2008] 1 MLJ 453; [2008] 1 CLJ 632, even though there was a crossclaim pending before another court, the Court of Appeal refused an injunction to stay winding up proceedings that was brought and premised upon a judgment of a court. In so doing the Court of Appeal declined to follow the decision of the English Court of Appeal in *Re Bayoil SA* [1999] 1 WLR 147.

[41] In *Re Bayoil SA*, a dispute arose between Seawind Tankers Corp ('Seawind') and Bayoil SA ('Company'). In the words of Nourse LJ, at pp 376–377:

> Pursuant to a clause in the charterparty, the dispute was submitted to arbitration in London, *Seawind claiming freight and diversion expenses and the company counterclaiming damages for breach of the charterparty, in particular for misrepresentations and breaches of warranty as to the condition of the ship, the absence of recent breakdowns and its maintainable speed*. On 15 August 1997 *an interim final award was made in Seawind's favour in respect of freight and the costs of obtaining the award. The award was made in accordance with the well-established rule that freight must be paid free of all deductions of whatsoever nature*: see *Aries Tanker Corp v Total Transport Ltd* [1977] 1 All ER 398; [1977] 1 WLR 185. *No stay of the award was sought or granted*. Conversely, the arbitrators declined to make an interim award in respect of diversion expenses, which are not governed by any such rule.
>
> On 13 October 1997 *Seawind served on the company a statutory demand in the prescribed form requiring payment, pursuant to the award*, of the sums of $US1,198,721.4302 and £6,078.4316 in respect of freight and costs respectively

together with interest. *No part of either sum having been paid, on 4 November 1997 Seawind presented a petition to the Companies Court seeking an order that the company be wound up*.

The learned judge at first instance granted the petition and made the winding up order in respect of Bayoil.

[42] Bayoil SA appealed and in allowing the appeal and discharging the winding up order, Nourse LJ held and stated as follows:

Having *held that the company had a genuine and serious counterclaim in the arbitration, which it had been unable to litigate, in an amount exceeding the amount of Seawind's debt*, the judge ought to have asked himself whether there were special circumstances which made it inappropriate for the petition to be dismissed or stayed.

Mr Russen has submitted that the matters relied on by the judge in exercising his discretion did in any event amount to *special circumstances. Shortly stated, those matters were the finality and unappealability of the interim award, the security for the company's counterclaim granted by Seawind's P & I club, the judge's concern as to the potential commercial insolvency of the company and the fact that there was no real evidence that the award could be paid*.

In my judgment those matters do not amount to special circumstances. Indeed, with the exception of the security for the company's counterclaim, they are likely to be found in many crossclaim cases. Mr Russen has also relied on the fact that no stay of the interim award was sought or granted. That adds nothing to his other points. The ability of a petitioning creditor to levy execution against the company does not entitle him to have it wound up. Moreover, an order that a company be wound up, unlike a bankruptcy order, is often a death knell. Nor can it be certain that a liquidator, even with security behind him, will prosecute the company's claims with the diligence and efficiency of its directors. These, I believe, are considerations which go to justify the practice in crossclaim cases. *I emphasise that the crossclaim must be genuine and serious or, if you prefer, one of substance; that it must be one which the company has been unable to litigate; and that it must be in an amount exceeding the amount of the petitioner's debt. All those requirements are satisfied in this case*.

I would allow the appeal and discharge the winding-up order. Whether the petition should be dismissed or stayed will be a question for discussion with counsel after judgment.

[43] It is noted that the term 'counterclaim' and 'crossclaim' was used interchangeably by Nourse LJ. Although a crossclaim may be understood to mean a claim between defendant's inter se, while a counterclaim is a claim by a defendant against the plaintiff in an action or against any other person who is joined as a party to the action (see O 15 of the Rules of Court 2012), for the purpose of the principle enunciated in *Re Bayoil SA*, whether it be a counterclaim or crossclaim against the petitioner matters not. Indeed, in *People Realty*, what the appellant company had was a claim against the petitioning creditor in the High Court in Penang and that was referred to as a 'crossclaim'.

[44] In *People Realty*, Nik Hashim JCA delivering the judgment of the Court of Appeal stated:

> [9] Before us, learned counsel for the appellant contended that:
>
> (a) the respondent had no standing to file the winding up petition against the appellant because the appellant has a valid cross claim which exceeds the amount in the judgment obtained by the respondent and in support he cited two cases:
>
> (i) *Malayan Plant (Pte) Ltd v Moscow Narodny Bank Ltd* [1980] 2 MLJ 53; [1980] 1 LNS 44 where Lord Edmund-Davies in delivering the judgment of the Judicial Committee of the Privy Council said at p 55 para A–B:
> There is no distinction in principle between a crossclaim of substance (such as in the Wools case) and a serious dispute regarding the indebtedness imputed against a company, which has long been held to constitute a proper ground upon which to reject a winding-up petition.
>
> (ii) *In re Bayoil SA* [1999] 1 WLR 147 where the English Court of Appeal held that where a winding-up petition was based on an undisputed debt but the company had a genuine and serious crossclaim, which it had been unable to litigate, exceeding the amount of the petitioner's debt the court would, in the absence of special circumstances, exercise its discretion by dismissing or staying the petition; and that, accordingly, in the circumstances, the judge should have either dismissed or stayed the petition.
>
> And
>
> (b) the High Court has powers under section 221 of the Act, rule 193 of the Companies (Winding-Up) Rules 1972 (the Rules) and under its inherent jurisdiction to restrain the advertisement of the petition and to make consequential orders.
>
> [10] *With respect, we do not agree. The respondent's winding-up petition was grounded on a valid judgment the execution of which had not been stayed. In fact both the High Court and the Court of Appeal had before the filing of the cross claim dismissed the appellant's application for a stay of execution of the judgment. Hence the respondent should not be prevented from pursuing its right to have the appellant wound up for its inability to pay its debt*. Only on the hearing of the petition the court would be able to consider the cross claim and determine whether it should exercise its discretion to order winding-up or not to order it. In the event the appellant is ordered to be wound up the cross claim can still be proceeded by the liquidator on behalf of the appellant under s 236(2) of the Act (*Crocuses & Daffodils (M) Sdn Bhd v Development & Commercial Bank Ltd* [1997] 3 CLJ 485 (CA) at p 491). Thus, to consider the cross claim, which is a separate issue altogether, before the hearing of the petition is premature and therefore, it should not be considered at that stage. (See *Chip Yew Brick Works Sdn Bhd v Chang Heer Enterprise Sdn Bhd* [1988] 2 MLJ 447; [1988] 1 CLJ 5 Rep; [1988] 2 CLJ 424 SC).
>
> [11] *The test in re Bayoil, supra, regarding crossclaim is not applicable in the present*

case, re Bayoil was decided upon consideration of a foreign statute. The case, like Malayan Plant, supra, also fortifies the view that the power of the court to dismiss or stay the petition is to be exercised only 'on the hearing of the petition' and not earlier. Therefore, the need to show special circumstances why the appellant should be wound up before the crossclaim is determined does not arise. (Emphasis added.)

[45] It need be mentioned that prior to the Court of Appeal's decision in *People Realty*, Abdul Aziz Mohamad JCA had observed in the decision of the Court of Appeal in *Pontian United Theatre Sdn Bhd v Southern Finance Bhd (formerly known as United Merchant Finance Bhd)* [2006] 2 MLJ 602; [2006] 1 CLJ 1067 at p 1075 and at p 1076, after referring to the observations of Lord Denning in *Re HF Wools Ltd* [1970] 1 Ch 27 as follows:

[14] ...

It may be understood from those words that so long as there is a genuine cross claim with substance in it which equals or exceeds the debt on which it is based, the winding-up petition must be rejected.

...

[18] In the present case the winding-up judge did not consider whether the appellants' counterclaim was a genuine counterclaim of substance. Whether the existence of an overtopping counterclaim that is of substance is in itself a ground for refusing a winding-up order, or whether, even with the existence of such a counterclaim, the court still has a discretion to order a winding-up, for the appellants to succeed on this ground they must at least show the existence of a genuine counterclaim of substance. In my view, they have not done that.

[46] In *Pontian United Theatre*, Zulkefli Makinudin JCA (as His Lordship then was) observed and cautioned:

[40] It is true the modern practice is that where a company had a genuine and serious cross claim or counterclaim against the petitioning creditor which it had not reasonably been able to litigate, the petition should usually be dismissed or stayed (see the case of *In re LHF Wools Ltd* [1970] 1 Ch 27). However, on this point my learned brother Abdul Aziz Mohamed JCA in his judgment had rightly and clearly amplified the position by stating that it is not sufficient for a company facing a winding-up petition to merely aver by affidavit the existence of a meritorious counterclaim.

[47] Faced with the decisions in *People Realty*, *Pontian United Theatre* and other authorities cited, the Court of Appeal in *Zalam Corp Sdn Bhd lwn Dolomite Readymixed Concrete Sdn Bhd* [2011] MLJU 1552; [2011] 9 CLJ 705, set aside a Fortuna injunction that was granted in circumstances not dissimilar to those in *People Realty*. Judgment had been entered in favour of the appellant however, the respondent maintained that it had a valid counterclaim and the Fortuna injunction sought was granted at first instance. However, the Court of Appeal held that a winding up petition based on a valid judgment was

not an abuse of the court's process and the matter of the respondent's insolvency is to be decided at the hearing of the winding up petition.

[48] What would appear to be an exception would be the situation which arose in the case of *Josu Engineering Construction Sdn Bhd v TSR Bina Sdn Bhd* [2014] 11 MLJ 916; [2013] 9 CLJ 650 where a Fortuna injunction was granted in circumstances where the parties in dispute were each possessed with a judgment against the other save that in the case of one of them, damages was still to be assessed. As Mary Lim J, after considering several authorities including *Pontian United Theatre, People Realty* and *Zalam*, stated in *Josu Engineering Construction* that:

> [51] ... in none of the factual scenarios above were any of the courts dealing with an undisputed debt that arises from a valid and binding judgment. To compound matters, in none of the cases considered was the crossclaim in the nature of an interlocutory judgment. Such a crossclaim is certainly not only real, genuine and serious but based on substantial grounds. While the defendant may have a final judgment after a full trial, the interlocutory judgment in the plaintiff's hands and awarded in its favour is no less a valid judgment of a competent court. That judgment had in fact been confirmed indirectly by the Federal Court when the defendant's leave to appeal was dismissed; and directly, by the Court of Appeal. This single factor cannot be ignored or, brushed aside.

[49] It needs to be emphasised however, that *Pontian United Theatre* was not a case where a Fortuna injunction was sought. It was a winding up petition. Therefore, the statement of the applicable law was in respect of a winding up petition and not quite relevant to the circumstances in *People Realty* and *Zalam* where Fortuna injunctions were sought.

[50] Thus, a would-be petitioner would not be restrained by an injunction against the filing of a winding up petition if it is to be based on a valid judgment of the court, and if filed, the petition would not be stayed. This is notwithstanding the existence of what was described in *Re Bayoil SA* as a genuine and serious crossclaim or counterclaim in excess of the judgment debt, unless the crossclaim or counterclaim has been determined and a judgment entered.

[51] More important for the case at hand, is the fact that in all those cases, the intended winding up petitions were premised upon the judgments of a court. They were not, as in this case, premised upon an adjudication decision.

[52] It therefore needs to be determined if an adjudication decision is equal to a judgment of a court of law and indisputable.

[53] Under the CIPAA, the decision of an adjudicator made under s 12(2) is

specifically called an 'adjudication decision' by reference to that term under s 4. A

[54] Under s 28 of the CIPAA, an 'adjudication decision' may be enforced by applying to the High Court for an order 'to *enforce* the adjudication decision *as if it is a judgment* or order of the High Court'. (Emphasis added.) B

[55] By way of contrast, in respect of an arbitration award, s 38 of the Arbitration Act 2005 provides as follows:

> 38 Recognition and enforcement
>
> (1) On an application in writing to the High Court, an award made in respect of an arbitration where the seat of arbitration is in Malaysia or an award from a foreign State shall, subject to this section and section 39 be recognized as binding and *be enforced by entry as a judgment in terms of the award* or by action. (Emphasis added.) C

[56] In my view it is significant that in respect of arbitration awards, under s 38(1), they are to be entered '*as a judgment* in terms of the award'. (Emphasis added.) Upon being entered 'as a judgment', the arbitration award is in effect transformed into a judgment of the court. D

[57] In fact, in *People Realty*, the judgment upon which the winding-up petition was issued was such a 'judgment' but under the former arbitration regime. As Nik Hashim JCA stated: E

> [2] The undisputed facts are that the petition for winding-up was presented against the appellant after the service of a statutory notice under s 218 of the Companies Act 1965 (the Act) on the appellant requiring payment of RM1,117,179.68 *based on a judgment obtained by the respondent dated 11 June 2003 which had been converted from an arbitral award pursuant to* s 27 of the Arbitration Act 1950 [sic]. F

[58] For completeness, s 27 of the Arbitration Act 1952 provided as follows: G

> An award on an arbitration agreement may, by leave of the High Court, be enforced in the same manner as a judgment or order to the same effect, and, where leave is so given, *judgment may be entered in terms of the award*. (Emphasis added.)

[59] Unlike the formula adopted in s 38(1) of the Arbitration Act 2005 (or s 27 of the Arbitration Act 1952), s 28 of the CIPAA does not provide that an adjudication decision may be entered 'as a judgment'. An application under s 28(1) is only for 'an *order to enforce* the adjudication decision *as if it is a judgment or order of the High Court*. (Emphasis added.) H

[60] The formulation adopted in s 28(1) does not provide for an adjudication decision being entered by the High Court 'as a judgment'. It only provides for the enforceability or enforcement of an adjudication decision 'as if it is a judgment'. It does not go so far as to deem or to allow for an adjudication I

A decision to be converted into a judgment of the court.

[61] Consonant with the objective of enforcement disclosed in s 28(2), 28(3) of the CIPAA goes on to make it clear that an order made by the Court under s 28(2), '... may be *executed in accordance with the rules on execution* of the B orders or judgment of the High Court'. (Emphasis added.)

[62] As an adjudication decision is not converted into a judgment of the court, it remains an adjudication decision even if an order is obtained under s 28 and as such, it is still subject to the provisions of the CIPAA. C

[63] Being subject to the provisions of the CIPAA includes being subject to the provisions of s 13 of the CIPAA. An adjudication decision is binding unless it is, inter alia, set aside or the 'dispute is finally decided by arbitration or the D court', giving rise to the commonly used oxymoron, 'temporary finality'.

[64] In relation to having the dispute 'finally decided by arbitration or the court', s 37 of the CIPAA provides that a payment claim under the CIPAA may be maintained concurrently with the dispute being referred to arbitration or E the court. Section 37 provides as follows:

> 37 Relationship between adjudication and other dispute resolution process
>
> (1) A dispute in respect of payment under the construction contract may be referred concurrently to adjudication, arbitration or the court.
>
> F (2) Subject to subsection (3), a reference to arbitration or the court in respect of a dispute which is being adjudicated shall not bring the adjudication proceedings to an end nor affect the adjudication proceedings.
>
> (3) An adjudication proceeding is terminated if the dispute being adjudicated is settled by agreement in writing between the parties or decided by arbitration or the G court.

[65] As Mohd Zawawi Salleh FCJ observed in the recent decision of the Federal Court in *Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd and another appeal* [2019] MLJU 742; [2019] 8 CLJ 433 at p 464, in concurrence with H the majority view in the Court of Appeal:

> [77] The High Court's view was endorsed by the majority. The majority stated:
>
> [48] In any event, *an adjudication a ward is only of a 'temporary finality' in nature against the main contractors and owners. CIP AA 2012 allows parties to take their* I *grievances to the High Court prior to the adjudication process, concurrent with the adjudication application and even after the adjudication process notwithstanding the adjudication decision to determine the very construction dispute before the adjudicator.* Reference to an arbitration tribunal is also available to the parties and the factual findings of the adjudicator are not binding on either the High Court or the arbitration tribunal. This is specifically provided for in section 37 of

the CIPAA 2012.

[78] *Further, s 37 of the CIPAA 2012 provides that an adjudication proceeding, arbitration and court litigation may proceed concurrently and in parallel.* It is also apparent that adjudication is a mandatory procedure under CIPAA 2012 and the right to statutory adjudication should not be circumvented by any contract where parties have agreed to arbitrate.

[66] In respect of the idea of 'temporary finality' Mary Lim J (as she then was) in *Foster Wheeler E & C (Malaysia) Sdn Bhd v Arkema Thiochemicals Sdn Bhd and another case* [2015] MLJU 1952; [2015] 1 LNS 632 observed as follows:

[48] It is often said that Parliament in its wisdom has seen it fit to enact CIPAA 2012 in its present form. In recognising that adjudication only offers temporary finality to the resolution of the payment dispute and that the subject matter of the adjudication decision can still be finally determined in arbitration or the Court, Parliament has implicitly and firmly endorsed the principle of 'pay now talk later'. In other words, the parties pay now against the adjudication decision; and talk later at the arbitration to finally resolve the issue.

[67] As for the nature of this 'temporary finality', David Wong Dak Wah CJSS in the decision of the Court of Appeal in *Milsonland Development Sdn Bhd v Macro Resources Sdn Bhd* [2018] 1 LNS 2078 observed that:

[20] ... This 'temporary finality' nature serves only the purpose of keeping the cash flow going for the contractors so that they would not be held to ransom by recalcitrant employers.

Similarly, the objective of the 'statutory adjudication mechanism' being to prevent the holding up of cash flow in the construction industry and to prevent delays in payment by lengthy disputes was also attributed to a similar legislation in the United Kingdom (see *Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd* [2001] 1 All ER (Comm) 1041; [2000] EWCA Civ 507; *Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] BLR 93 and *Stiell Ltd v Riema Control Systems Ltd* [2000] Scot CS 174 (23 June 2000) cited by Gloster LJ in *Walker Construction (UK) Ltd v Quaside Homes Ltd and Another* [2014] EWCA Civ 93).

[68] Zulkefli PCA delivering the judgment of the Federal Court in *View Esteem Sdn bhd v Bina Puri Holdings Bhd* [2018] 2 MLJ 22 at p 31 stated:

[6] This is an appeal on the scope and application of the CIPAA, a new legislation which came into force on 15 April 2014. It is noted that the CIPAA was enacted to introduce statutory adjudication to address lengthy payment times that affected the contractors in the construction industry. It is intended as an interim measure to ease the contractors cash flow.

[69] Having regard to the provisions of the CIPAA and the rationale for this statutory adjudication mechanism, the very nature of an adjudication decision is such that it is not final in a sense equal to the finality of a judgment of a court.

[70] By virtue of s 13 of the CIPAA, an adjudication decision is only provisionally binding if there are concurrent arbitration or court proceedings, or conditionally binding if there are none but there might be such proceedings to have the dispute finally determined.

[71] The very nature of an adjudication decision is therefore such that while it may be enforceable as if it were a judgment debt when ordered to be so, it is nevertheless *disputable*. It is still open to a party against whom the adjudication decision is given, to legally dispute the decision by way of arbitration or in court.

[72] The position therefore is that a party against whom an adjudication decision is made may still dispute the decision, but until decided otherwise, the adjudication decision is to be honoured. If not honoured, and if so ordered by the court, the adjudication decision is *enforceable* as a judgment of the court, until and unless it is set aside or a final decision is arrived at to the contrary, in an arbitration or by a court of law.

ENFORCEMENT UNDER S 28 OF THE CIPAA

[73] As is contemplated by s 28(3) of the CIPAA, the order of the court made under s 28(2) 'may be executed in accordance with the rules on execution of the orders or judgment of the High Court'. These would clearly include the forms of enforcement provided under O 45 of the Rules of Court 2012, such as enforcement by way of a writ of seizure and sale, garnishee proceedings, order of committal, charging orders and the appointment of a receiver.

[74] That an adjudication decision may be ordered to be enforced as a judgment of the court does not mean included in s 28 of the CIPAA is a statutory right of enforcement by way of winding up proceedings.

[75] It has long been held that a winding up petition is not a form of execution. In the decision of the Court of Appeal in *Maril-Rionebel (M) Sdn Bhd & Anor v Perdana Merchant Bankers Bhd and Other Appeals* [2001] 4 MLJ 187 at p 198, Gopal Sri Ram JCA observed:

> *But a petition for winding up is not execution, for a winding up petition is not based upon any judgment of a court. Normally, it is based on the inability of a company to pay its debts as and when they fall due*. Such inability is normally evidenced by the company's inability to satisfy or compound a notice of demand issued pursuant to s 218 of the Act. But the issuance of such a notice is not a sine qua non for the

> presentation of a winding up petition. What is needed is compelling evidence of the company's inability to pay its debts as and when they fall due. There are two cases that support this view. (Emphasis added.)

Clearly, His Lordship could not have intended to mean that a winding up petition *may not* be based on the inability of a company to make payment under a judgment debt.

[76] In *Re Bayoil SA; Seawind Tankers Corp v Bayoil SA* [1999] 1 All ER 374 at p 383, Ward LJ said:

> Very similar considerations inform the court's approach to the granting of a stay of execution, where the court does not lightly deprive the successful litigant of the fruits of his judgment, but will do so where an appeal would otherwise be rendered nugatory. I appreciate that this analogy cannot be taken too far. *Winding up is not a form of execution*, and stays may not be granted on a judgment for a dishonoured cheque, which is treated as cash, just as freight has a similar unique characterisation. None the less, the principles underlying that approach seem to me to be of relevance when dealing with a company winding up. (Emphasis added.)

As stated above, the decision in *Re Bayoil SA* [1999] 1 All ER 374 was not followed by our Court of Appeal in *People Realty Sdn Bhd v Red Rock Construction Sdn Bhd* [2008] 1 CLJ 632, but on a different issue.

[77] In *Ridgeway Motors (Isleworth) Ltd v ALTS Ltd* [2005] 2 All ER 304 at p 311, Mummery LJ observed:

> ... *A winding up petition is neither* (a) an action upon a judgment in the special sense of being designed to re-establish by legal proceedings the liability of the company to pay a judgment debt and obtain another judgment for it, *nor (b) a process of execution of the judgment on which the petition is based. It is sui generis, being in the nature of a wider legal proceeding available for the collective enforcement of the admitted or proved debts of the company for the benefit of the general body of creditors on a pari passu basis* (see, for example, *Re Lines Bros Ltd* [1982] 2 All ER 183 at pp 194–195; [1983] Ch 1 at p 20). (Emphasis added.)

See also *NFC Labuan Shipleasing I Ltd v Semua Chemical Shipping Sdn Bhd* [2017] MLJU 900; [2017] 1 LNS 943.

[78] A winding up petition, by its nature, seeks not to enforce a right to payment, be it under a judgment or an adjudication decision. It is not designed to realise monies due or payable under a judgment debt. A winding up petition is quite the very antithesis of enforcement. It seeks, to the contrary. Rather than seeking payment, a petitioner invoking s 465(1)(e) of the Companies Act 2016, as in the current case, is in fact asserting that the company is unable to pay its debt, is insolvent and should be wound up.

[79] In my view, winding up petitions are not for the purpose of enforcement of either a judgment or order of the High Court or an adjudication decision and thus not a form of enforcement within s 28(1) of the CIPAA.

[80] That being the case, the body of law that has evolved and that would admit to the issue of an injunction to restrain the presentation of a winding up petition based on a debt that is the subject of a bona fide dispute upon substantial grounds was not displaced by s 28 of the CIPAA.

[81] That enforcement under s 28 of the CIPAA did not specifically include the right to initiate winding up proceedings does not however, mean that s 28 is bereft of any value. The various forms of execution or enforcement of judgments and orders of the court, recognised as such, are available for the purposes of securing payment.

[82] It also does not mean that winding up proceedings cannot be commenced based on a debt that has arisen by virtue of an adjudication decision — whether ordered to be enforced by the court or otherwise (as in *Likas Bay Precinct Sdn Bhd v Bina Puri Sdn Bhd* [2019] 3 MLJ 244).

[83] All it means is that the presentation of a winding up petition based upon an adjudication decision is not a specific statutory right provided under the CIPAA and is therefore subject to the general principles relating to abuse of the process of the court referred to in *Fortuna Holdings* and the cases cited.

[84] This conclusion, in my view, is not incompatible with the rationale for the statutory adjudication regime under the CIPAA. A successful party is at liberty to enforce an adjudicating decision with a view to securing payment which is among the main objectives of the CIPAA. However, this right of enforcement to secure payment stops short of permitting proceedings to wind up a party against whom an adjudication decision is made, if the adjudication decision is the subject of a genuine dispute upon substantial ground; a position which may be contrasted with that in respect of a judgment of the court, which is quite to the contrary.

CONTENTION THAT ADJUDICATION DECISIONS ARE NOT DISPUTABLE

[85] Learned counsel for the defendant maintained that once an adjudication decision is ordered to be enforced under s 28 of the CIPAA it is indisputable and as such, an injunction would not issue against the presentation of a winding up petition even if there is a bona fide dispute on substantial grounds, a counterclaim and/or set off of a greater sum.

[86] Learned counsel referred to the case of *Bumimetro Construction Sdn Bhd v Mayland Universal Sdn Bhd and another appeal* [2017] MLJU 2245. However, that was a case involving an application to enforce an adjudication decision and a counter application to stay the adjudication decision. That was not a case that involved the presentation of a winding up petition based on an adjudication decision.

[87] In *Bumimetro Construction*, Lee Swee Seng J (as His Lordship then was) stated:

> [66] Whilst the adjudication decision has the element and effect of temporary or interim finality, it does not mean that it is denuded and devoid of any effect unless of course a stay of the adjudication decision is granted.
>
> [67] Its binding effect cannot be ignored and it is precisely because of that, Parliament has allowed a party in whose favour an Adjudication Decision is given to be able to proceed to exercise the remedies available to it under the CIPAA.

[88] With respect, the views of Lee Swee Seng J must be correct. That an adjudication decision is binding and may be made enforceable cannot be disputed. The decision in *Bumimetro Construction* however, does not bear out the contention of learned counsel for the defendant.

[89] Similarly, in *Bertam Development Sdn Bhd v R & C Cergas Teguh Sdn Bhd* [2017] MLJU 2276, cited by counsel for the defendant, the court was there concerned with an application to stay an adjudication decision made under s 16 of the CIPAA, albeit in the face of a statutory demand made under s 466(1) of the Companies Act 2016. The court's auxiliary jurisdiction in equity was not invoked for the issue of an injunction on the ground of an abuse of process in a form disclosed in *Fortuna Holdings* and the cases cited above. What were considered in that case were the principles applicable to a stay of execution.

[90] There was then the decision of the High Court in *Barisan Performa Sdn Bhd v Hype Park City Sdn Bhd* [2018] MLJU 10. This was in fact a winding up petition that was heard by the High Court. Concurrent with the hearing of the petition was a motion filed by the respondent to strike out the petition. The facts were relatively plain. There was an adjudication decision and there was an order of court made for its enforcement. An application for a stay and to set aside the adjudication decision was heard and dismissed. As there was no payment made, the winding up petition was presented. The respondent resisted the petition on the basis that it had a crossclaim and/or set off against the petitioner and that it was solvent. In dismissing the motion to strike out and in granting the petition, Mohamed Zaini Mazlan J in his conclusion stated:

A Conclusion

[33] I therefore find that the respondent has *failed to raise any bona fide dispute*, nor has it succeeded in rebutting the presumption of insolvency. I also find no merits to the respondent's application to strike out. (Emphasis added.)

B

[91] Reference was also made by learned counsel for the defendant to the decisions in the United Kingdom in *Jamil Mohammed v Dr Michael Bowles* [2002] 394 SD 2002 and in *Re Victory House General Partner Ltd* [2019] Ch 1.

C **[92]** In *Jamil Mohammed*, there was an application to set aside a statutory demand made under the Insolvency Act 1986 based on the decision of an adjudicator. The application was based on, '... two of the grounds set out in r 6.5(4) of the Insolvency Rules 1986 which provides that the court may grant the application if (b) the debt is disputed on grounds that appear to the court
D to be substantial and (d) the court is satisfied on other grounds that the demand ought to be set aside'. In dismissing the application to set aside, it was held, in respect of the issues raised, as follows:

1. Is the adjudicator's decision a debt sufficient to form the basis of a statutory
E demand?

The simple answer is 'yes'.

2. ...

3. Does the applicant dispute the debt on substantial grounds?

F In my judgment 'no'. *He has already put his arguments on jurisdiction to the adjudicator who has rejected them*. If he is unhappy with that decision his remedy is to go to court but in the absence of any such application it is not for this court to consider those arguments, although in my view they do not show an arguable case. *On the substantive issues raised by the applicant whereby he seeks to argue procedural*
G *unfairness and a technical contractual point again on the evidence before me I do not consider that they are sufficient to argue that the debt is disputed on substantial grounds*.

4. Are there any other grounds on which the statutory demand should be set aside?

The applicant's counsel submitted that without taking a further step and obtaining summary judgment the respondent cannot seek to enforce the decision of the
H adjudicator. For the reasons set out above I reject that argument.

35. I therefore dismiss this application to set aside the statutory demand, the respondent may petition forthwith and the applicant is to pay the respondent's costs. (Emphasis added.)

I The applicable rules themselves allow for the setting aside of a statutory demand if a debt is disputed on grounds that appear to the court to be substantial and where the court is satisfied on other grounds that the demand ought to be set aside. However, the court in *Jamil* did not find that the debt was disputed on substantial grounds.

[93] In *Re Victory House* was concerned with a winding up petition. An adjudication award had been made against a company. The decision was challenged in the High Court. On the other hand, the petitioner had applied for enforcement of the award. The rival applications were considered and the company's allegations were rejected. Instead, summary judgment was entered in favour of the petitioner by the deputy judge. There was no application to stay this judgment and there was no appeal. Upon the presentation of the winding up petition the company applied to strike it out based on an asserted crossclaim said to be in excess of the judgment debt and that the petition was an abuse of process. It was submitted by learned counsel for the company as follows:

> 29 Mr Chivers says that *In re Bayoil SA* applies in the present case. There is a judgment debt. It can be executed but that is not a special circumstance (see Nourse LJ) and the general test, *absent special circumstances, is that a petition should be dismissed if there is a crossclaim put forward bona fide on substantial grounds in an amount which exceeds the petition debt.*

[94] At pp 13–14 of the report, the learned judge stated as follows:

> 32. I therefore have to ask whether the nascent crossclaim, the claim in restitution which Mr Chivers has explained to me, is a bona fide crossclaim on substantial grounds. I have no doubt it is a bona fide claim. *I have also no doubt it is on substantial grounds. At the moment it seems to me that it is a claim that would succeed but I need not go that far*.
>
> 33. As to special circumstances, *I am not persuaded there are any special circumstances here to take this case outside the general rule. The general rule is an important rule which should be consistently applied and not departed from too readily*. Indeed, Mr Chivers says, with force, that there are special circumstances fortifying rather than weakening the general rule. He points to the fact that the contractor has already received a substantial sum by way of interim payment in excess of the correct interim payment under the terms of the contract. Mr Chivers, as I have already described, says it would be quite wrong of the court to bring about the winding up of the employer company for its failure to pay a yet further sum.
>
> 34. *Nothing which I have said detracts in any way from the binding character of the judgment which has been made. It may appear to be a strong thing to say that the employer, having failed to comply with a judgment against it, should none the less escape the consequences involved in a winding up, but it seems to me that that is the very thing which was considered to be appropriate in In re Bayoil SA and, on the facts of this case, I also consider it is a more just result than the alternative contended for by the petitioner*.
>
> 35. The result is that I will dismiss the petition. (Emphasis added.)

[95] *Gill Construction Co Ltd v Butler* [2010] 2 NZLR 229, a decision of the High Court of New Zealand was also referred to. In that case, an adjudicator had decided in favour of Butler against Gill Construction under the New Zealand Construction Contracts Act 2002 ('CCA'). Having done so, Butler issued a statutory demand on Gill Construction which, similarly, was a precursor to liquidation proceedings under the Companies Act 1993 in New

Zealand, if not honoured. The CCA also has similar features to those in the CIPAA. It has what was described as a 'pay now, argue later' feature. The decision of the adjudicator may not necessarily finally resolve the dispute but the party who is found to be owed the amount may, inter alia, under s 59 of the CCA, recover the sum owed as a 'debt due' in any court or apply to enforce an adjudication determination 'by *entry as a judgment*'. (Emphasis added.) This provision allowing for an adjudication determination to be entered as a judgment is quite unlike what is provided in the CIPAA.

[96] In *Gill Construction*, the court concluded that there was no need for an adjudicator's determination to be entered as a judgment before it can be the basis of a statutory demand. Relying on a decision of the Court of Appeal in New Zealand, *Laywood v Holmes Construction Wellington Ltd* [2009] NZCA 35, the court also held that the statutory demand may not be set aside on any asserted counterclaim, set off or cross-demand in respect of the adjudicator's determination.

[97] Mallon J in *Gill Construction,* observed as follows:

> [20] At present the adjudication in his favour means that he has a debt that is enforceable in the courts. He does not need to have judgment entered in his favour in order to issue a statutory demand in respect of it (just as the creditor had not in *Volcanic Investments*). *In Laywood the creditor had obtained judgment for the adjudication, but in my view that does not make any difference to the position here. It is not contended by Gill that any of the grounds on which a judgment can be resisted would be made out here. In any event the entry of judgment under the CCA is just one way that the adjudicator's determination can be enforced. Applying the view expressed in Laywood, any counterclaim which Gill has and intends to bring is not a ground for setting aside the statutory demand.*
>
> [21] If Gill's asserted counterclaim is not a basis for setting aside the statutory demand, it cannot in my view be a basis for preventing the liquidation application from proceeding to a hearing. There is an unsatisfied statutory demand and Mr Butler is entitled to proceed absent anything unfair or improper about the proceeding. *The prospect that the liquidation proceeding will be advertised may well provoke Gill to pay the demand, but Gill's asserted counterclaim does not make that unfair or improper. The CCA is a pay now, argue later regime*. Gill has been required to pay the adjudicated amount since 17 June 2009 and it has not done so. It is no answer to say that Gill is able to pay the amount and has put aside the amount in a solicitors' trust account. Mr Butler is entitled to the money now. (Emphasis added.)

[98] In *Laywood*, builders of a redevelopment of residential apartments had obtained adjudication determinations in their favour against the developers. The developers did not pay, and the builders successfully had the adjudicator's determinations entered as judgments. It was argued by the developer, among other things, that a judgment entered on the basis of adjudicator's decision could not be a 'final judgment'so as to provide the basis for the issue of a

bankruptcy notice under the New Zealand Insolvency Act 1967. A

[99] Arnold J, who delivered the judgment of the Court of Appeal in *Laywood* at pp 255–256 of the report, stated:

> [52] In the present case, the adjudicator's determination was made under s 48(1)(a). However, while the adjudicator's determination under s 48(1)(a) was binding on the parties (see s 60 of the CCA), it was not final in the sense that it did not finally resolve all aspects of the dispute between them. The CCA adopts a 'pay now, argue later' philosophy, so that determinations are in a sense temporary and incomplete. So: B
>
> (a) Sections 25 and 26 of the CCA recognise that, despite the reference of a matter to adjudication, other dispute resolution processes (such as court action, arbitration or mediation) may be pursued, although they do not automatically bring the adjudication to an end. The adjudication process must terminate only if some other dispute resolution process determines the dispute before the adjudicator reaches a determination (s 26(3)). C D
>
> (b) Adjudicators' determinations about the rights and obligations of the parties under a construction contract in terms of s 48(1)(b) or s 48(2) are not enforceable in the same way as determinations for the payment of money under s 48(1)(a). This is so even where those matters are addressed in a determination dealing with a monetary claim (see ss 58(2) and (3)). Where an adjudicator determines a question in dispute about the rights and obligations of the parties and a party fails to comply fully with the determination, the other party may bring court proceedings to enforce his or her rights. But while the court must have regard to the adjudicator's determination, it is not bound by it (s 61). E F
>
> (c) While there may be an opportunity in some cases for a party who wishes to raise a counterclaim, set off or cross-demand to do so in the course of an adjudication (for example, when serving the written response to the adjudication claim under s 37), this will not always be possible. *That, together with the prohibition in s 79 on raising a counterclaim, set off or cross-demand in proceedings for the recovery of a debt under s 59*, also means that an adjudicator's determination may not finally resolve the full dispute between the parties. G
>
> [53] *But that does not mean that an adjudicator's determination under s 48(1)(a) which has been entered as a judgment is incapable of enforcement. As we noted earlier, s 77 recognises that such a judgment may be enforced through the execution processes provided for in the District Courts Rules. Section 79 of the District Courts Act identifies several enforcement possibilities, for example, garnishee proceedings. Equally relevant are the CCA's provisions for the making and enforcement of charging orders (see ss 29, 49, 76 and 78, which, like s 7 7, is a 'for the avoidance of doubt' provision). While there is no similar 'for the avoidance of doubt' provision in relation to the Insolvency Act, we consider that the same principle applies. Accordingly, we consider that a judgment entered under s 74 is final judgment for the purposes of s 19(1)(d).* (Emphasis added.) H I

[100] What is significant is that s 79 of the CCA precludes a court from taking

into account counterclaims, set offs or cross-demands save as provided, where *judgment has been entered* for the amount. Section 79 of the CAA provides as follows:

> 79 Proceedings for recovery of debt not affected by counterclaim, setoff, or cross-demand
>
> In any proceedings for the recovery of a debt under section 23 or section 24 or section 59, *the court must not give effect to any counterclaim, setoff, or cross-demand raised by any party to those proceedings other than a setoff of a liquidated amount if—*
>
> (a) *judgment has been entered* for that amount; or
>
> (b) there is not in fact any dispute between the parties in relation to the claim for that amount. (Emphasis added.)

[101] Referring to the prior decision in *Volcanic Investments Ltd v Dempsey & Wood Civil Contractors Ltd* (2005) 2 NZCCLR 370, a decision by Randerson J, Arnold J said:

> [57] Randerson J at para [20] held that *the words 'proceedings for the recovery of a debt' in s 79 include the issue of a statutory demand and the institution of winding-up proceedings. The language of s 79 was plain — a court was prohibited from giving effect to any counterclaim, set off or cross-demand, except in limited circumstances* (at para [21]). Section 79 prevailed over s 290(4)(b) of the Companies Act (at paras [26]–[35]). Randerson J ordered Volcanic to pay the amount of the statutory demand within 14 days. In default of payment, Dempsey & Wood could apply to put Volcanic into liquidation (at para [38]). (Emphasis added.)

[102] Unlike the CIPAA regime in Malaysia, the CCA in New Zealand allows an adjudicator's determination to be entered 'as a judgment' and not merely to apply for 'an order to enforce the adjudication decision as if it is a judgment or order of the High Court' as provided under s 28(1) of the CIPAA.

[103] In addition, the legislative regime of the New Zealand CCA is such that the court is, '... prohibited from giving effect to any counterclaim, set off or cross-demand, except in limited circumstances'.

[104] Of significance for the purposes of the present case are the reasons given by Arnold J in *Laywood* in respect of counterclaims, set offs or cross-demands vis a vis bankruptcy notice or statutory demand:

> [61] We emphasise at this point the distinction between an application to set aside a bankruptcy notice or a statutory demand on the one hand and an adjudication of bankruptcy or order to wind up a company on the other. The question we are asked to resolve concerns the former. *In that context, we prefer the view expressed by Randerson J in Volcanic Investments. We find some assistance in the exceptions provided for in s 79. Under that section, a set off may be taken into account in debt recovery proceedings (including the s 73 process) if it relates to a liquidated amount and either*

judgment has been entered for that amount or there is no dispute between the parties in relation to the claim for that amount. Absent that, a determination can be entered as a judgment under s 73 and enforcement proceedings taken through the District Court, and any counterclaim, set off or crossclaim must be pursued through separate proceedings.

[62] If that is the position in relation to the enforcement processes available through the District Court, or where there is a charging order under the CCA, there seems in principle to be no reason why it should not apply in respect of a bankruptcy notice under s 19(1)(d) of the Insolvency Act or a statutory demand under the Companies Act. *It is true that such processes have an additional dimension to them, in the sense that ultimately they lead to a process which focuses on liquidity and asset worth. It is also true, as Associate Judge Doogue said, that bankruptcy and liquidation proceedings have a broader objective than simply ensuring that a particular creditor is paid. Despite that, bankruptcy notices and statutory demands are, in a practical sense, important enforcement mechanisms, as Randerson J recognised. And in the present case, the debt which Holmes Construction seeks to recover has the force of a court judgment behind it*. This is not a case where a creditor has sought to use bankruptcy or liquidation proceedings to recover a small amount from a person or company which can plainly afford to pay it.

[63] *If the contrary view were to be adopted, the efficacy of the s 73 process would, in our view, be undermined. Parties to construction contracts could refuse to pay an amount ordered by an adjudicator, and resist bankruptcy notices or statutory demands in relation to the debt, on the basis that they had a counterclaim, set off or cross-demand. The effect of this would simply be to recreate similar problems to those which led to the enactment of the CCA, albeit in a different context.*

[64] *We acknowledge that this approach may produce hardship. A party may have a meritorious counterclaim, set off or cross-demand and may not raise it in the context of the CCA or by means of separate proceedings. Yet that party may be precluded from raising it in an application to set aside a bankruptcy notice or a statutory demand that follows an unsatisfied judgment issued under* s 74. *This seems hard. But while the adoption of the alternative view would alleviate this hardship, it would, as we have said, create another hardship — it would keep the party in whose favour the adjudicator had ruled from its entitlement under the CCA, and thereby frustrate its purpose*.

[65] We emphasise again that we were asked to consider only the first of the two stages referred to at para [61] above. It may be that different considerations arise at the point that the court must determine whether it will exercise its discretion to adjudicate a judgment debtor bankrupt or order the liquidation of a company (see *AMC Construction Ltd v Frews Contracting Ltd* [2008] NZCA 389 at para [7]). But that is a point on which we express no opinion.

[66] In the result, we consider that, although the dispute between the parties under a construction contract may not be finally resolved *when a determination is entered as ajudgment, the judgment is 'final' for the purpose of* s 19(1)(d). Although the statutory context is in some ways different, we agree with this aspect of the decision in *Cavanah*. (Emphasis added.)

[105] The final outcome is similar to that stated by our Court of Appeal in *Muniammah Muniandy*, once there is a judgment of the court and it has not

A been set aside, the judgment debt is indisputable and the principles relating to disputed debts enunciated in Fortuna Holdings would no longer apply.

[106] The decision of the Supreme Court of New South Wales in *Re Douglas Aerospace Ltd* [2015] NSWSC 167 was also referred to. That was a case that involved an application to set aside a statutory demand based on a judgment entered upon an 'adjudication certificate'. Again, and similarly, a statutory demand served under the Corporations Act 2001 is a precursor to winding up proceedings and failure to honour such a notice will give rise to a presumption of insolvency. There are also provisions that cater for disputed debts and the setting aside of statutory demands.

[107] Under s 25 of the New South Wales, Building and Construction Industry Security of Payment Act 1999 No 46 ('the BACISOPA') an adjudication certificate may be filed as a judgment debt. Section 25(1) provides as follows:

> 25 Filing of adjudication certificate as judgment debt
>
> (1) An adjudication certificate *may be filed as a judgment* for a debt in any court of competent jurisdiction and is enforceable accordingly. (Emphasis added.)

[108] In considering the application to set aside the statutory demand, Bereton J in *Re Douglas Aerospace* stated of the general principles, as follows:

> General principles
>
> [52] At the outset, it is as well to note certain principles relevant to whether a debt can be the subject of a genuine dispute or offsetting claim that are of more general application — that is to say, their application is not confined to debts arising under BACISOPA and similar legislation.
>
> [53] First, *it is well-established that a judgment debt is beyond dispute, while it stands* ... This applies even in the case of a default judgment. It applies also to an arbitration award ... And it applies notwithstanding that the judgment is subject to an appeal or an application to set it aside, although the pendency of an arguable appeal may provide 'some other reason' for setting aside the demand — at least if the judgment is the subject of a stay pending the appeal, or security is given ... Essentially, that is so because the judgment, so long as it stands, binds the parties and concludes any dispute as to the existence or amount of the debt.
>
> [54] Secondly, the same applies in respect of debts, not being judgment debts, that are made conclusive by statute ...
>
> [55] Thirdly, however, when it comes to an offsetting claim, the question for the purpose of Corporations Act, s 459H(1)(b), is simply whether there is an 'offsetting claim' within the definition in s 459H(5), namely:
>
> > *Offsetting claim* means a genuine claim that the company has against the respondent by way of counterclaim, set off or cross-demand (even if it does not

arise out of the same transaction or circumstances as a debt to which the demand relates). A

[109] In *Douglas Aerospace,* Bereton J found and ordered as follows:

Conclusion B

[101] My conclusions may be summarised as follows:

(1) ...

(4) However, *a judgment debt founded on a filed adjudication certificate is beyond dispute: the existence or pendency of an arguable claim in curial proceedings that the adjudication does not reflect the true legal rights of the parties cannot amount to a 'genuine dispute' about the existence or amount of a judgment debt consequent upon an adjudication*. Nor does the pendency of curial proceedings which seek relief to the effect that the adjudicated amount is not payable because the adjudication does not reflect the true legal rights of the parties of itself amount to 'some other reason' for setting aside the demand. C D

(5) While *a 'true' offsetting claim — for example, a crossclaim for damages for negligence or breach of contract, or the recovery by way of restitution of amounts already allegedly overpaid — may be relied on to set aside a statutory demand for a judgment debt founded on an adjudication certificate, the existence or pendency of an arguable claim that an adjudication does not reflect the true legal rights of the parties — involving no crossclaim for damages, and where there has been no payment and thus no complete claim for restitution — cannot be an offsetting claim for the purposes of s 459H(1)(b)*. In this respect, I am not only unpersuaded that the decision in *Diploma* is plainly wrong, but I respectfully accept its correctness. E F

...

[103] It follows that, *while there is no genuine dispute, for the purposes of s 459H(1)(a)*, as to the existence or amount of the judgment debt that founds the demand, *there is an offsetting claim for the purposes of s 459H(1)(b) in the amount of $107,040*. According to the formula in s 459H(2), the 'substantiated amount' is $122,280.23, being the difference between the 'admitted amount' of $229,320.23 and the 'offsetting total' of $107,040. G

[104] The court therefore orders that:

(1) pursuant to s 459H(4), the *creditor's statutory demand dated 27 2014 served by the defendant on the plaintiff be varied* so that the amount of the demand is $122,280 and the demand has effect as so varied from when it was served on the plaintiff. (Emphasis added.) H

[110] However, relevant for the present case is the fact that under the BACISOPA, an adjudication certificate may be filed as a judgment. Again, an approach quite different from s 28 of CIPAA. In addition, there are specific provisions for what is termed as an 'offsetting claim' in the Corporations Act 2001. I

[111] Also referred to was the decision of the Singapore High Court in *Lim Poh Yeoh (Alias Lim Aster) v Ts Ong Construction Pte Ltd* [2016] SGHC 179; [2016] 5 SLR 226. Before the decision in *Lim Poh Yeoh* is considered, it must be noted that the enforcement provisions of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ('SOPA'), considered in the case, are quite different from that of the CIPAA.

[112] The relevant provisions of SOPA are set out below:

> 23 Consequences of not paying adjudicated amount
>
> (1) Where a respondent fails to pay the whole or any part of the adjudicated amount to a claimant in accordance with section 22, the claimant may do either of the following:
>
> (a) ...
>
> (b) ...
>
> (2) Without prejudice to the generality of subsection (1), where a party to an adjudication fails to pay the whole or any part of the adjudicated amount to any other party in accordance with section 22, the aggrieved party may *apply for and enforce the adjudication determination as if it were a judgment debt in accordance with* section 27.
>
> 27 Enforcement of adjudication determination as judgment debt, etc.
>
> (1) An adjudication determination made under this Act may, *with leave of the court, be enforced in the same manner as a judgment or an order of the court to the same effect*.
>
> (2) Where leave of the court is so granted, *judgment may be entered in the terms of the adjudication determination*. (Emphasis added.)

[113] Therefore, where leave of the court is granted for the enforcement of an adjudication determination, '... judgment may be entered in the terms of the adjudication determination'. This again, is unlike the position under s 28 of the CIPAA.

[114] In fact, seen in juxtaposition, the distinction between obtaining leave to enforce an adjudication determination in s 27(1) and judgment being entered for the adjudication determination in s 27(2) of the SOPA magnifies the difference between mere enforcement and conversion into a judgment of the court.

[115] In *Lim Poh Yeoh*, after securing an adjudication determination, the respondent issued a statutory demand on the appellant. In turn, the appellant sought to set aside the statutory demand on the ground that she had a valid cross demand in the form of a suit that she had brought against the respondent. The appellant's application was dismissed.

[116] Upon hearing the appeal, Edmund Leow JC held that a judgment debt is enforceable in like manner as any judgment of the court and stated, in p 14 of the report, as follows:

> [54] It is clear from this that a debt owing under an adjudication determination may, with leave, be enforced in like manner as any judgment of the court. ... I, therefore, rejected the appellant's contention that a judgment entered in the terms of an adjudication determination can never be enforced through the bankruptcy process and instead accepted the respondent's submission that it was fully entitled to issue the SD.

[117] Having so held, the learned JC went on to allow the appeal and to set aside the statutory demand, stating as follows:

> [71] While the policy objective of facilitating cash flow in the construction industry is vital, I do not think that Parliament intended it to be one that was to be achieved at all costs. Notably, *our SOPA does not contain the equivalent of s 79 of the NZ CCA, which clearly precludes a respondent from relying on the existence of a cross claim as a ground for resisting enforcement proceedings for the debt* (see [67] above). *It is particularly important to bear this in mind when one is concerned with the insolvency process, which is qualitatively different from other mechanisms of enforcement*. As the Court of Appeal emphasised in its recent decision in *Chan Siew Lee Jannie v Australia and New Zealand Banking Group Ltd* [2016] 3 SLR 239 ('*Jannie Chan*') at [18]:
>
> > [B]ankruptcy proceedings are not intended as a means for a single creditor to enforce his debt but is instead a method for the collective realisation of the assets of the debtor in order to *maximise recovery for the general body of creditors.* [emphasis added; emphasis in original omitted]
>
> ...
>
> [72] The upshot of all this is that *if Parliament intended that the SOPA regime would take precedence over the usual rules of the insolvency/bankruptcy regime, then it would have said so explicitly*, but this was not the case ...
>
> ...
>
> [74] The respondent had placed great emphasis on the fact that it has had 'no other option but to issue the statutory demand' as it had tried but failed to enforce the judgment through other means. Much as I sympathised with the respondent's plight, I was mindful that there were many competing interests involved. Any decision I made in this case would have implications not only for the present case (affecting not only the appellant herself but also any other creditors she might have), but also future cases which come before the courts. *If successful claimants in adjudications were allowed to pursue respondents to insolvency (or bankruptcy, as the case may be) regardless of the underlying state of the account, that would represent a significant change in the law which I did not think Parliament intended and it would be a change with ramifications which extend far beyond the construction industry*.
>
> ...
>
> (3) Should the SD be set aside?

A [76] I, therefore, approached this as I would any other application to set aside a statutory demand and on that footing, I found that there was ample reason to set aside the SD. *I had already found that the appellant's cross claim in S 92/2015 gaverise to triable issues*. I also found that it was sufficiently quantified in monetary terms (thus distinguishing this case from *Diploma* ([57])) and clearly broader in scope B than the adjudication as it related also to many other heads of damages which could not have been brought during the adjudication (in particular, I have in mind the claims for inadequate rectification of defects, which could only have been discovered after the works had been completed).

[77] ... The appellant plainly has a right to seek a final resolution of the dispute C between her and the respondent. *A declaration of bankruptcy could potentially put an end to all this, rendering the appellant's statutory right to seek a final determination of the dispute in a court of law nugatory*. In my judgment, and viewing matters in the round, I held that the SD should be set aside.

Conclusion

D [78] To summarise, *I allowed the appeal to the extent that I held that prayer 3 of the present application (the application to set aside the SD under r 98(2)(a) of the BR) should be granted*. However, I affirmed the AR's decision to make no orders on prayers 1-2 and to dismiss prayers 4-5. (Emphasis added.)

E **[118]** Clearly the cases from the various jurisdictions disclose that while the basic regime and rationale governing adjudication of construction contracts are very similar, there are differences when it comes to enforcement. In some, judgments are entered in terms of the adjudication decision or determination. F Section 28 of the CIPAA, however, merely affords an order of the court, 'to enforce the adjudication decision as if it is a judgment or order of the High Court'.

[119] In some jurisdictions, such as in Singapore and the United Kingdom, G even though adjudication determinations and adjudication decisions may have been entered as a judgment, that in itself would not preclude insolvency proceedings against a company from being challenged on the basis of there being in existence a genuine crossclaim upon substantial grounds.

H **[120]** In New Zealand, the cases demonstrate that once an adjudication determination is entered as a judgment, it is regarded as final for the purposes of enforcement. In addition, there is s 79 in the CCA that precludes the courts from giving effect to any counterclaim, set off, or cross-demand save in specific circumstances.

I **[121]** In New South Wales Australia, the BACISOPA also provides under s 25(1) for an adjudication certificate to be filed *as a judgment*. Even then, it would seem that if there exists a genuine 'off-setting claim', a statutory demand based on such a judgment may be set aside or varied.

[122] However, more important to the current case are the actual provisions of the CIPAA. The authorities cited in respect of an adjudication decision upon which a statutory demand under s 466(1) of the Companies Act 2016 is based, do not in my respectful view decide that the debt created is not disputable even if ordered to be enforced *as if it is a judgment or order* of the High Court.

[123] Because an adjudication decision is not entered as a judgment or deemed equal to a judgment of the High Court, it is not indisputable like a judgment of the court. In addition, nothing in the CIPAA displaces the principles enunciated in *Fortuna Holdings* which have been accepted by our courts.

Is there a genuine dispute and counterclaims and/or set offs upon substantial grounds?

[124] As mentioned, during the pendency of the adjudication the parties had served notices of arbitration on each other.

[125] In its notice of arbitration of 18 March 2019, the defendant stated that it will claim against the plaintiff 'all the claims and damages arising from ASM's said breaches of contract and/or in tort, including but not limited to all claims set out' in its notice. These included the payments awarded in its favour under the adjudication decision.

[126] In response to the defendant's notice of arbitration, the plaintiff through its solicitors' letter of 8 April 2019 disputed the defendant's claims.

[127] In its notice of arbitration of 17 May 2019, the plaintiff sought a declaration that the defendant had unlawfully terminated the construction contract, claimed for loss, expense and damage arising therefrom and from several other alleged breaches of the construction contract.

[128] Further and better particulars of its claims were provided by plaintiff in its supplementary affidavit. There was a claim for RM142,222,574.85 made up of liquidated damages for delay, at the rate of RM49,840 a day, based on an architect's certificate of non-completion dated 7 April 2018.

[129] The plaintiff also contended that a notice of default was issued dated 28 March 2019 setting out the defaults which included suspension of works, failure to proceed with works at site regularly, abandonment of works since 1 March 2019 and repeated failure to comply with architect's instructions. It was alleged that as the breaches were not remedied, the plaintiff terminated the construction contract by way of a notice of termination dated 23 April 2019.

[130] Following its termination of the construction contract, it was alleged that the plaintiff had incurred the following:

(a) cost of rectification amounting to RM3,459,480 and which rectification works are still continuing;

(b) liquidated damages for end purchasers due to the defendant's delay in completing the project, amounting to RM98,037,211.23;

(c) rental of RM496,584 which was incurred due to the defendant's alleged erroneous installation of a single storey portable site office on a neighbouring land;

(d) an omission to deduct from payment due to the defendant or to take into account a sum of RM17,330,819 based on a quantity surveyor's valuation of 30 January 2019;

(e) repair costs of RM3,755,500 and RM1,625,200 for leaks due to cracks;

(f) RM1,988,004.20 transportation of excavated rocks which the defendant allegedly failed to transport; and

(g) a sum of RM1,524,735.62 allegedly owed under what was described as a 'Block Purchase Agreement' dated 25 August 2017.

[131] The total amount claimed, including set offs, exceeds the amount found to be due to the defendant under the adjudication decision.

[132] The defendant contended however, that the plaintiff's liquidated damage claim was not warranted as the time for completion of the entire works was extended. The original completion date was the 7 January 2018. The defendant alleged that the completion date was then extended to 15 March 2019. Correspondences between the parties were exhibited.

[133] These correspondences disclosed a letter dated 18 April 2018 from the defendant to the plaintiff, purporting to record an agreement to the defendant's appeal for extension of time. The plaintiff's reply dated 22 May 2018 contained the following comment:

> We wish to inform that from our understanding of the events, there is no particular revised completion dates being agreed or confirmed. We noted your submission of the revised programme but our records shows that time and again you have failed to adhere to your work programme for this project.

[134] On 3 September 2018 the defendant wrote to the plaintiff following a meeting between the parties' representatives that morning. This letter sort to record and confirm certain things allegedly agreed between the parties at the meeting. Among the things this letter sought to confirm were:

> Firstly we thanked you for your assurance that it is not your intention to impose LAD and your advice to resolve the issue of outstanding interim certificates on a commercial rather than on a contractual basis.
>
> You have advised that you will issue the CPC for Stage 1 works upon substantial completion of the works for handing over to superstructure contractor, the CPC will be backdated to 30 August 2018, followed by an interim certificate to be issued immediately to account for the work completed up to 30 August 2018.

[135] This letter drew a reply from the plaintiff dated 18 September 2018 which contained, among other things, the following statement:

> We totally disagree with the contents of your letter ref: EP 450/030918 dated 3rd September 2018.

[136] On 12 October 2018, the defendant wrote again to record the following in relation to a meeting held between the representatives of the parties on 11 October 2018:

> During the meeting we have proposed the Sectional Completion Demarcation together with the corresponding Revised Completion Dates.
>
> We are pleased to record that our proposal have been agreed and accepted in the meeting by all parties present.

[137] However, there was neither an objection nor a confirmation given in evidence of this assertion. There was also no indication of any waiver of rights accrued by reason of the prior delays.

[138] The defendant's claims as indicated above were in respect of its progress claims no 16 to 26, in respect of which no interim certificates had been issued. It was alleged that the supervising officer and/or architect had breached certain conditions in the construction contract. It was also alleged that they had undervalued the works done in respect of its certificate of payment No 15. Allegations were also made that the plaintiff, through the supervising officer, had interfered with or obstructed the issuance of the interim certificates and that the plaintiff had been in breach of the construction contract for failing to issue the relevant interim certificates within thirty days from its receipt of the defendant's progress claims and to make payment thereon.

[139] It was upon these alleged breaches that the defendant issued a notice of termination dated 13 March 2019. The plaintiff on the other hand issued its own notice of termination based on its allegation of breaches of the construction contract on 23 April 2019.

[140] As for the alleged omission of the sum of RM17,330,819.80, the defendant's objection was that this was only said to be a 'Possible omission' by the quantity surveyor; no details had been provided and, in any event, it was only an estimate.

[141] In relation to the alleged leaks, the defendant claimed that they were not informed. In respect of the export or removal of rocks, the defendant maintained that rocks could not be delivered due to the site being inaccessible and/or that there was no available area to deposit the rocks.

[142] Against the claim for payment of rent, the defendant contended that it was not a party to the block purchase agreement.

[143] In addition to these specific contentions, the defendant maintained that some of these claims had been raised by the plaintiff in the adjudication and they were dismissed. The defendant also contended that the fact that there is an ongoing arbitration was irrelevant as the adjudication decision had been made and it had not been stayed or set aside.

[144] Clearly, there are disputes and arguments against each party's claims. However, based on the evidence made available, I am of the view that the plaintiff's disputes of the defendant's claims allowed by the adjudication decision and its counterclaims and/or set offs, save for its claim of RM1,524,735.62 allegedly based on the block purchase agreement, are bona fide and upon substantial grounds. Whether the plaintiff will finally be successful is a matter for the arbitrator and I am not required to and I express no views on this.

The order of the court of 29 November 2019

[145] As indicated earlier, on 29 November 2019, the High Court in Kuala Lumpur in Originating Summons No WA-24C-113–07 of 2019 ('OS 113') made the following order:

1. Keputusan Adjudikasi tersebut bertarikh 21.6.2019 dan Keputusan Adjudikasi Tambahan bertarikh 7.8.2019 oleh Encik Rajendra Navaranam, sebagai Pengadil Adjudikasi, dikuatkuasakan seolah-olah Keputusan Adjudikasi itu adalah penghakiman atau perintah Mahkamah Tinggi;
2. Bahawa suatu perintah dimasukkan yang memihak kepada Plaintif mengikut keputusan yang terkandung dalam keputusan Adjudikasi dan Keputusan Adjudikasi Tambahan tersebut, iaitu:-
    a. Defendan hendaklah membayar kepada Plaintif jumlah teradjudikasi sebanyak RM59,767,269.32;

b. Defendan hendaklah membayar kepada Plaintif kos Peguamcara sebanyak RM150,000.00;

c. Defendan hendaklah membayar kepada Plainitf Kos Adjudikasi dalam jumlah sebanyak RM203,929.40.

[146] For the same reason given by the Court of Appeal in *Muniammah Muniandy,* the payments ordered in OS 113, and which order stands and has not been set aside, are not disputable.

[147] In addition to an order to enforce the adjudication decision as if it were a judgment or order of the High Court, the order in OS 113 goes one step further to order payment in terms of the adjudication decision. In so doing, it had, in my view, converted the adjudication decision into an order of the court and thus rendered the payments ordered no longer disputable.

[148] However, the defendant's statutory demand in question was issued on 25 June 2019, about five months *before* the order in OS 113 was obtained. The statutory demand was issued when the parties had already served their respective notices of arbitration and it was clear to the defendant that disputes in respect of the subject matter of the adjudication decision and counterclaims and/or set offs arising from the construction contract were being brought to arbitration.

[149] In my view, the order in OS 113 for payment in terms of the adjudication decision cannot be relied upon to *ex post facto* render the defendant's prior statutory demand to be a demand that was made based on it. The *subsequent* order of the court in OS 113 cannot alter the circumstances and the character of the statutory demand that was made, *at the time it was made*. The defendant's statutory demand was made based on the adjudication decision which was disputed and not on the order of the court in OS 113.

[150] This distinction may appear somewhat pedantic having regard to the 'liberal' approach taken by the Federal Court in *Malaysia Air Charter Co Sdn Bhd v Petronas Dagangan Sdn Bhd* [2000] 4 MLJ 657 in respect of a statutory demand made under s 218 of the former Companies Act 1965.

[151] In *Malaysia Air Charter,* it was held that the exact amount due need not be specified in the statutory demand so long as it exceeded the minimum required for the presentation of a winding up petition (see also *United Malayan Banking Corp Bhd v Richland Trade & Development, Sdn Bhd* [2000] 1 MLJ 385).

[152] The rationale given in by Mohamed Dzaiddin FCJ in *Malaysia Air*

Charter at pp 667–668, were as follows:

> ... We would reiterate here that we agree with *Re Fabo* that *a literal interpretation of the section would compel the court not to make a winding-up order notwithstanding the existence of clear evidence that an undisputed sum due exceeding RM500 has remained unpaid* after a demand made without any reasonable explanation for the failure to pay. In the instant case, the statutory demand required the appellant to pay the respondent the judgment sum of RM334,118.79 together with interest at 8% pa etc as at the date of the notice. From the evidence, the aforesaid sum remained unpaid the section literally or strictly, it means no winding-up order could be made as the exact amount due as at the date of the notice has not been quantified, notwithstanding that the debt exceeded RM500 and remained unpaid. By contrast, the liberal interpretation would permit the court, if proved to its satisfaction, to make a winding-up order.
>
> Secondly, we agree with *Re Fabo* that commercial reality demands that *'preference be given to an interpretation that will remove from unmeritorious respondents the temptation to undertake an investigation into the exactness of the debt claimed to be owing on the relevant date* in cases where complicated accounts or running accounts with daily adjustments may render probable the risk of some small errors having been made in the course of ascertaining with precision the extent of the debt. *Indeed, the possibility exists that a contrary interpretation might lead to the absurdity that an understatement of the debt in the notice would prevent the making of an order where to do so was clearly appropriate*'. It is necessary to consider the factual situation presented in this appeal for the unreality of the literal approach to become evident. *Here, the appellant was required to pay the respondent the judgment sum of RM334,118.79 together with interest thereon at the rate of 8% pa on all outstanding sums from 28 October 1988 until the date of realization*. By taking the literal interpretation approach, the respondent is required to undertake an exercise in calculating the exact sum due as at the date of the notice when on the face of the notice the sum due is more than RM500 and the appellant has been shown as deemed to be unable to pay its debts.

[153] It needs to be pointed out that in *Malaysia Air Charter,* the statutory demand was based on a judgment debt. The rationale given by the Federal Court for the 'liberal approach' adopted was to '... remove from unmeritorious respondents the temptation to undertake an investigation into the exactness of the debt claimed to be owing on the relevant date' and 'notwithstanding the existence of clear evidence that an undisputed sum'. The objective was to avoid what was described as, '... the absurdity that an understatement of the debt in the notice would prevent the making of an order where to do so was clearly appropriate'.

[154] Although based on the Companies Act of 1965, there is really no reason why the same rationale should not apply to similar provisions in the Companies Act of 2016 and there was no suggestion to the contrary by learned counsel (see *Karisma Synergy Sdn Bhd v Gates PCM Construction (M) Sdn Bhd* [2019] 1 CLJ 122).

[155] However, the liberal approach in *Malaysia Air Charter* was in respect of whether the exact sum owed at the time a statutory demand is made needed to be stipulated. It was not concerned with the basis upon which a demand was made. For the purposes of a Fortuna injunction on the other hand, the basis of a statutory demand made and whether it is disputable or not or would admit of a cross claim for a larger sum, is material.

[156] Reverting to the current case, although the amount demanded in the defendant's statutory demand, while stipulated, was more than, and thus differed from, the amount that was the subject matter of the order in OS 113, that may not in itself be fatal in light of *Malaysia Air Charter*.

[157] The situation appertaining in the current case was not merely inexactitude in the sum demanded in the defendant's statutory demand but the basis upon which the defendant's statutory demand was made. Unlike in *Malaysia Air Charter*, the defendant's statutory demand was predicated on the adjudication decision, before it was amended, and which decision was obviously disputed by the plaintiff coupled with crossclaims which exceeded the amount decided in the defendant's favour. It was not a statutory demand based on the order made in OS 113. Thus, in my view, the distinction drawn is no mere pedantry or form, but one of substance.

[158] On the other hand, once a judgment or order is entered, and based on existing authorities, it is clear that a judgment creditor may issue a statutory demand under s 466(1)(a) of the Companies Act 2016 based on the judgment debt in respect of which no dispute to the debt may be countenanced.

CONCLUSION

[159] In light of the foregoing, I am of the view that the plaintiff's application should be allowed.

[160] An adjudication decision, even one that has been ordered to be enforced as if it were a judgment or order of the High Court, is a disputable decision. Under s 28 of the CIPAA, an adjudication decision is not deemed to be a judgment of a Court of law, the latter being not disputable. This is particularly so as the very nature of an adjudication decision is of 'temporary finality' or is only provisionally final.

[161] Although of temporary finality, an adjudication decision is nonetheless enforceable as if it were a decision or order of the High Court, if so ordered. In this regard enforcement would include all the modes of enforcement available under O 45 of the Rules of Court 2012. By the available modes of enforcement

A or execution, the objective of the CIPAA to secure early payment or to ease the creditor's cash flow is preserved.

B **[162]** An adjudication decision may also be the basis for the issue of a statutory notice under s 466(1) of the Companies Act 2016, even if not ordered to be enforced as if it were a judgment of the High Court.

C **[163]** However, if a statutory demand is issued under s 466(1)(a) based on a debt or an adjudication decision (even one that has been ordered to be enforced as if it were a judgment of the court), but not based upon a judgment of a court of law, an injunction may issue to restrain the creditor from presenting a winding up petition, if the debt or the adjudication decision is genuinely disputed upon substantial grounds or if there exists a genuine crossclaim, counterclaim or set off against the would-be petitioner for an amount or D amounts greater than the alleged debt upon substantial grounds.

E **[164]** Winding up proceedings can have very damaging consequences. Cross defaults may be triggered. They can have grave financial implications and may, in certain cases, be financially paralysing. In the case of a property developer for example, such financial consequences can adversely affect innocent third party purchasers.

F **[165]** If, for example, an adjudication decision is very substantial, and one that the alleged debtor company may not be able to pay simply because of the amount, it may result in the alleged debtor having to submit to winding up proceedings without the opportunity of disputing the debt in arbitration or through the courts, even though the scheme of the CIPAA expressly envisages an adjudication decision being binding unless the dispute is finally decided by G arbitration or the court.

H **[166]** If, in the same example, the debtor is a developer and may have just sufficient means to meet the amount demanded, making payment of the disputed debt may deprive it of the financial means it requires to complete the project precipitating, yet again, consequences that would probably and adversely affect innocent third parties.

I **[167]** There is clearly danger that winding up proceedings may be abused. Its consequence can be harsh and, perhaps, that is probably why it is a process often resorted to without any prior attempt at execution. This potential for abuse was clearly recognised in *Fortuna Holdings* and abuse of process is the very basis upon which an injunction would issue to prevent winding up proceedings in respect of disputed debts. As winding up proceedings are not in themselves proceedings for the recovery of money, the issue of an injunction in

such circumstances would not result in defeating or obstructing the objective of the CIPAA.

[168] In the current case the amount in the adjudication decision is substantial. The defendant had itself commenced arbitration proceedings in respect of, inter alia, the very amounts granted in the adjudication decision. The plaintiff had also served a notice of arbitration with its claims. The parties' disputes are now pending determination in an arbitration.

[169] In circumstances such as the present, I do not see the need for any haste to subject a company against whom an adjudication decision is made to winding up proceedings and to subject it to the risk of the damaging consequences that are associated with such proceedings.

[170] As Chan Sek Keong CJ of Singapore expressed in *Metalform Asia Pte Ltd v Holland Leedon Pte Ltd* [2007] 2 SLR 268 at pp 296–297, in terms of policy and after considering contentions to the contrary:

> [82] In our view, we do not think that these matters outweigh the policy consideration that the commercial viability of a company should not be put in jeopardy by the premature presentation of a winding-up petition against it where it has a serious crossclaim based on substantial grounds. Such a petition may adversely affect the reputation and the business of the company and may also set in motion a process that may create cross-defaults or cut the company off from further sources of financing, thereby exacerbating its financial condition. So long as the court is satisfied that on the evidence there is a distinct possibility that the crossclaim may exceed the undisputed debt, it should give the company the opportunity to prove its claim rather than to allow a winding-up petition to be filed, with all the normal consequences attendant upon the filing of such a petition. Businesses that have a chance of recovery should not be pushed into a state that makes it difficult for them to recover.

[171] The defendant, being well aware that the disputes were pending in arbitration, chose post-haste to issue a statutory demand under s 466(1) of the Companies Act 2016. It was only after the issue of its statutory demand that the defendant applied to enforce the adjudication decision.

[172] There is no doubt in my mind that the threatened winding up proceedings in this case was employed *in terrorem* as an indirect means to secure payment of the adjudication decision probably because of the slew of possible financial adversities it would likely cause.

[173] Accordingly, the plaintiff's application was allowed with costs and it was ordered that the defendant, its servants, agents or otherwise be restrained, and an injunction was granted restraining the defendant, its servants, agents or

otherwise from presenting any winding up petition against the plaintiff based specifically on the statutory demand issued by the defendant dated 25 June 2019.

Plaintiff's application allowed.

Reported by Mohd Kamarul Anwar